Supreme Court, U.S.
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IN THE

Supreme Court of the United States

KING C. LUM, PETITIONER

v.

KAUAI COUNTY COUNCIL; BRYAN BAPTISTE, individually, AND IN HIS CAPACITY AS THE MAYOR OF KAUAI COUNTY, STATE OF HAWAII; LEON GONSALVES, SR., INDIVIDUALLY, AND IN HIS CAPACITY AS A COMMISSIONER, KAUAI POLICE COMMISSION; MICHAEL H. TRESLER, INDIVIDUALLY, AND IN HIS CAPACITY AS THE DIRECTOR OF FINANCE, KAUAI COUNTY; KAUAI COUNTY; AND JOHN DOES 1 TO 20 AND JANE DOES 1 TO 20

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. This Court, in *Cleveland Board of Education v. Loudermill*, et. al, 470 U.S. 532 (1985), held that a state employee with a property interest in his continued employment was entitled to a due process hearing prior to the termination of his employment for allegations of bad performance or misconduct alleged against him. Appellant King Chi Lum was terminated from his employment as a result of the misconduct of a third-party. Whether, in light of this Court's holding that a public employee has a right to a due process hearing prior to his termination, does a public employee have the right to a due process hearing when he will be terminated for the misconduct of a third person.

2. Whether an employee entitled to a due process hearing before his termination, is further entitled to a hearing officer who is without bias against the employee.

3. Whether the district court erred when it adopted the assessment of the hearing officer in a hearing involving a third party, that the selection of King Chi Lum for the police chief of Kauai County was tainted, therefore finding that King Chi Lum did not have a property interest in his continued employment as the Police Chief of Kauai.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 2

STATEMENT 4

REASONS FOR GRANTING THE PETITION 16

CONCLUSION 31

APPENDIX

Circuit Court Decision 1a
District Court Amended Order (11/7/07) 7a
District Court Order (9/25/07) 57a
District Court Order (5/18/07) 69a
Order Denying Rehearing 89a

TABLE OF AUTHORITIES

Page

CASES

ALEXANDER V. GARDNER-DENVER CO, 415 U.S. 36, 39 L. ED. 2D 174 (1974) 29
ANDERSON V. CITY OF PARSONS, 209 KAN. 337, 496 P.2D 1333 (1972) 17
BAKALIS V. GOLEMBESKI, 35 F.3D 318 (7TH CIR. 1994) ...25, 26
CLEVELAND BOARD OF EDUCATION V. LOUDERMILL, 470 U.S. 532, 105 S.CT. 1487, 84 L.ED. 2D 494 (1985) 18, 19
HALL V. MARION SCHOOL DISTRICT, 31 F.3D 183 (4TH CIR. 1994) 25
HUI MALAMA AINA O KO'OLAU V. PACARRO, 4 HAW. APP. 304, 666 P.2D 177 (HAW. APP. 1983) 17
MARSHALL V. ELLWOOD CITY BOROUGH, 189 PA. 348, 41 A. 994 (1899) 17
MARTIN V. WILKES, 490 U.S. 755, 104 L.ED.2D 835 (1989) 30
MATTER OF N ET. AL. V. NEW YORK CITY BOARD OF ETHICS, 139 MISC. 2D 634, 528 N.Y.S. 2D 794 (SUP. CT. N.Y.-1987) 23
MCCLURE V. INDEPENDENT SCHOOL DISTRICT NO. 16, MAYES COUNTY, OKLA., 228 F.3D 1205 (10TH CIR. 2000) 19, 21
MCDONALD V. CITY OF WEST BRANCH, MICHIGAN, 466 U.S. 284, 104 S. CT. 1799, 80 L. ED. 2D 302 (1984) 30
SANCHEZ V. CITY OF SANTA ANA, 915 F.2D 424 (9TH CIR. 1990) 21, 22
SINGEWALD V. MINNEAPOLIS GAS CO., 274 MINN. 556, 142 N.W.2D 739 (1966) 17
STIVERS V. PIERCE, 71 F.3D 732 (9TH CIR. 1995) 24
WAIKIKI RESORT HOTEL, INC. V. CITY AND COUNTY OF HONOLULU, 63 HAW. 222, 624 P.2D 1353 (HAW. 1981) 16, 17
WISCONSIN V. CONSTANTINEAU, 400 U.S. 433 30

STATUTES

28 U.S.C. § 1254(1) 2
42 U.S.C. § 1983 ..... 3, 20

Petitioner, King Chi Lum respectfully petitions for a Writ of Certiorari to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the District Court, is reproduced at App. 1a to 6a. The order denying Lum's Petition for Panel Rehearing and Petition to Rehearing en Banc is reproduced at App. 89a to 90a. The Order Granting Defendants' Motion for Partial Summary Judgment filed on May 18, 2007 is reproduced at App. 69a to 88a. The order Granting Defendant Michael H. Tresler's Motion for Summary Judgment filed on September 25, 2007 is reproduced at 57a to 68a. The Amended Order Granting Defendant Gonsalves' Motion for Summary Judgment filed on November 7, 2007 is reproduced at 7a to 56a.

JURISDICTION

The Order Granting Defendants' Motion for Partial Summary Judgment was entered in the District Court on May 18, 2007. The Order Granting Defendant Michael H. Tresler's Motion for Summary Judgment for Summary Judgment was filed in the District Court on September 25, 2007. The Order Granting the Motion for Summary Judgment filed by Defendant Leon Gonsalves, Sr. was filed in the District Court on November 7, 2007. The Stipulation for Dismissal Without Prejudice as to all Remaining Claims and Partied was filed in the District Court on March 18,

2008. The Order Granting Plaintiff's Motion for Entry of Judgment was filed in the District Court on April 28, 2008. The Judgment, pursuant to the Order Granting Plaintiff's Motion for Entry of Judgment, was filed on April 29, 2008.

The Petitioner's Notice of Appeal was filed on April 25, 2008.

The Memorandum Decision of the United States Court of Appeals was filed on December 1, 2009. Petitioner filed his Petition for Panel Rehearing and Petition for Rehearing En Banc on December 18, 2009. On February 11, 2010, the United States Court of Appeals for the Ninth Circuit denied the Petition for Panel Rehearing and Petition for Rehearing En Banc, making Lum's Petition for Writ of Certiorari due in this Court on or before May 12, 2010.

On April 30, 2010, Petitioner submitted an Application for Extension of Time to File a Petition for Writ of Certiorari to the Supreme Court of the United States. On May 6, 2010, this Court extended the time within which Petitioner may file his Petition for Writ of Certiorari to June 14, 2010.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

U.S. Constitution, Amendment V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a

presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT

A. Factual Background

Plaintiff-Appellant, King Chi Lum ("Lum") is an American of Chinese ancestry. In 1983, Lum joined the Kauai Police Department ("KPD"); in 1987, Lum was promoted to the rank of Sergeant; in 1993, Lum was promoted to the rank of Lieutenant. From 1991 to 1995, Lum was assigned to the Intelligence Enforcement Unit of KPD, a unit that was responsible for investigating organized crime activity.

On September 16, 1995, Kauai Police officers, under the direction of Lum, arrested a pimp and exotic dancers on suspicion of prostitution. The arrest, prosecution of the suspects, and the internal police investigation that followed has been called the "Fantasy Express" incident. While in police custody at the Kauai Police station, a female suspect, Monica Alves, was fondled, had her clothing removed and her picture taken by Kauai Police officers.

After he learned of the accusation, Lum reported the matter to the Kauai Police Chief. As a result of Lum's report and the police investigation that followed, disciplinary action was taken against 5 officers; one officer, a Randy Machado ("Machado") was prosecuted for a criminal offense and convicted; the other officers were terminated or otherwise disciplined. One of the officers, Sergeant Mel Rapozo, was initially fired but later reinstated with loss of rank. Mr. Rapozo resigned from KPD and during the relevant time period, was a Kauai County Council member.

Leon Gonsalves, Sr. ("Gonsalves") is Part-Hawaiian and a former police officer who was employed as an investigator with the County Prosecutor's office during the investigation and prosecution of the police officers for their misconduct in the "Fantasy Express" incident. In 2004, Gonsalves was appointed a member of the Police Commission by Mayor Bryan Baptiste.

In 2003, the then Police Chief George Freitas resigned as the Kauai Police Chief. The Kauai County Police Commission ("Police Commission") appointed Willie Ihu, the Deputy Police Chief, to be the interim Police Chief during the recruitment period for the replacement chief. The Police Commission, who were all appointed by the Mayor and confirmed by Kauai County Council ("Council"), were the following persons: Stanton Pa, Michael Ching, Carol Furtado, Victor Punua and Leon Gonsalves, Sr.

During the deliberations of the Police Commission of the applicants, Gonsalves was adamant that Lum was not qualified to be Police Chief, citing Lum's role in the "Fantasy Express" matter. Gonsalves stated that he held Lum responsible for the behavior of the KPD officers who were disciplined as a result of their misconduct. Gonsalves himself favored a Darryl Perry ("Perry"), a Kauai born candidate who had retired as a major from the Honolulu Police Department. Through Gonsalves, Perry sought to submit to the Police Commission, a re-organization plan for the Police Department. Upon the advice of the County Attorney, the Police Commission returned the plan to Perry with the instruction that he could re-submit it at the final interview.

The Police Commission, by a vote of 3 to 2, appointed Lum as the interim police chief in April 2004. Voting to appoint Lum the interim Police Chief were Commissioners Ching, Punua and Pa. Voting against the appointment were commissioners Furtado and Gonsalves. The final applicants for the Police Chief position were Regina Ventura, Darryl Perry and King Chi Lum.

As part of the selection process, the final applicants were interviewed by a clinical psychologist who reported his findings to the Police Commission. Based on his findings, the Police Commissioners favored the appointment of Lum to the position of permanent Police Chief. Prior to the meeting set for the confirmation of Lum as the permanent Police Chief, two events took place which evidenced an effort to postpone the appointment of Lum. First, the County Council requested that the Police Commission delay its decision, second, Gonsalves, with the assistance of the County Attorney's office, submitted a folder containing the transcript of a police officer who gave testimony before a prior Police Commission, contradicting Lum's statement that he was unaware of the police misconduct at the time of the misconduct.

The Police Commission appointed Lum in September 2004 with Commissioners Ching, Punua, Pa and Furtado voting for the appointment, and Gonsalves dissenting. During the meeting to confirm the appointment of Lum as the permanent Police Chief, Gonsalves was heard to utter a threat to the other Police Commissioners.

The Police Commission's action to enter into an employment contract with the newly appointed Police Chief was voted on and approved on September 24, 2004, prior to the appointment of a permanent police chief. The Police Commission's action to appoint Lum as the Chief of Police was voted on and approved on September 29, 2004.

Lum's Employment Agreement was signed by Lum and all the members of the Police Commission except Gonsalves. Effective for a five year term, the Agreement provided that the Agreement may be terminated by the Police Commission prior to its termination date, upon being given a written statement of the charges against him and a hearing before the Police Commission pursuant to Section 11.04 of the Kauai County Charter. Section 11.04 of the Kauai County Charter likewise provided that Lum may be removed prior to his five year term "only after being given a written statement of the charges against him and a hearing before the commission." Lum resigned from his Police Chief position after being advised by Michael Tresler, County Finance Director, that he, Tresler, was cancelling Lum's Employment Agreement on the basis of an Ethics Board proceeding bought against Police Commissioner Michael Ching, and not Lum.

Lum was not afforded a pre-termination hearing as was provided by his Employment Agreement and the Kauai County Charter. Lum submits that Tresler's cancellation of his employment agreement, which violated Lum's due process rights, was the result of a conspiracy based on race discrimination, retaliation for filing a race discrimination charge, and retaliation for

whistleblowing activities. The facts pertinent to Lum's race discrimination claim, claims of retaliation for filing a race discrimination charge, retaliation for whistleblowing activities and allegations of conspiracy are set forth below.

B. Petitioner's Claims of National Origin Discrimination

Lum and Gonsalves had worked in the detective section office from 1988 to 1989. Gonsalves had been assigned to that unit for several years when Lum was assigned to the detective section. Initially, Gonsalves gave Lum the nickname of "Alii," which is Hawaiian for "King," Lum's first name. Gonsalves' use of the nickname "Alii" stopped when officers of Hawaiian ancestry objected because Lum was not Hawaiian. Gonsalves then referred to Lum as "Hop Sing," a reference to the Chinese cook in the 1960s television series "Bonanza."

Lum did not appreciate the nickname Hop Sing, but did not object as Gonsalves was his senior. When Gonsalves left KPD in 1989 to work for the County Prosecutor's office, the name calling subsided.

Lum was selected permanent Chief of Police on September 29, 2004. On October 14, 2004, Gonsalves wrote and transmitted on the County of Kauai electronic mail system, addressed to a Cathy Shim, an email which stated in pertinent part, "TOMORROW IS THE SWEARING IN FOR HOP-SING AND LITTLE JOE, I WOULDN'T BE THERE, THANK GOOD [SIC] I THINK I MIGHT THROW-UP." The message from Gonsalves was transmitted to other County

employees, delivered to Lum, and publicized in the Kauai newspaper, The Garden Isle.

Upon learning of the email sent by Gonsalves, in which he was referred to as "Hop-Sing," Lum protested to the Mayor, who requested that Gonsalves resign from his Police Commission position. Gonsalves refused.

C. Petitioner's Claims of Retaliation for Whistleblowing Activity and for Filing a Discrimination Complaint and Conspiracy

On October 18, 2004, Lum learned about the "Hop-Sing" email from the KPD Dispatch Supervisor. Lum immediately contacted the Mayor's Administrative Assistant Gary Heu and stated his objection to the racial nature of the email. On October 27, 2004, the local news media covered the "Hop-Sing" email.

Between October 15, 2004 and November 5, 2004, Gonsalves prepared a memoranda which protested Lum's selection and included information about an October 15, 2004 meeting of the Police Commission, which he did not attend. Gonsalves then met with County Attorney Lani Nakazawa, who advised him to notarize the memoranda and submit them as complaints to the Kauai County Ethics Board ("Ethics Board").

On November 1, 2004, Gonsalves and Lum were called to a meeting at the Mayor's office to resolve the issue. Gonsalves gave his apology, which Lum did not

believe was sincere. On November 5, 2004, the Mayor requested that Gonsalves resign as a Police Commissioner and Gonsalves refused. On November 5, 2004, Gonsalves had his memoranda notarized and sent a copy to a Deputy State Attorney General. On November 8, 2004, Gonsalves had a second copy of his memoranda notarized and sent it to the Ethics Board.

Previously, on September 7, 2004, Lieutenant Scott Yagihara submitted a letter to the Council complaining about the Police Commission and its selection of Lum as the interim Police Chief. In his letter to the Council, Lieutenant Yagihara referenced the Fantasy Express incident stating that Lum's undercover operation resulted in one of the "largest scandals in department history and cost the County of Kauai a substantial sum of money." On September 28, 2004, Lieutenant Yagihara submitted an Addendum dated September 24, 2004, to his September 7, 2004 letter stating that he had reliable information that Commissioner Michael Ching had asked a police union representative to testify at a Police Commission meeting on behalf of Lum. On September 27, 2004, six of the seven Council members sent a confidential letter to the Police Commission requesting that it postpone the appointment of a permanent police chief.

On November 1, 2004, the Council, referring to an executive session held on October 1, 2004, referred Yagihara's letters to the Ethics Board. On January 5, 2005, Lieutenant Miles Tanabe submitted a letter to the Board of Ethics complaining of the appointment of Lum as Police Chief. In his letter, Tanabe referenced Darryl Perry as his source of information as to the contents of confidential investigative reports of the applicants for

Kauai County Police Chief; Tanabe also complained of Lum's conduct during the Fantasy Express incident.

On January 20, 2005, the Kauai County Council held an executive session to consider whether to conduct an investigation of the Kauai Police Department. At this meeting, the Council discussed an investigation being conducted by the Board of Ethics, a police investigation that had been turned over to the Prosecutor's office, and a proposed investigation into the termination of a KPD police recruit.

The Ethics Board conducted investigations into the conduct of Police Commissioners Carol Furtado and Michael Ching, and deputy Police Chief Ron Venneman. The Ethics Board investigation took place on November 22, 2004. Lum was not investigated nor given notice of any investigation into his conduct. Sandra Helmer, a member of the Board, testified that no notice of investigation was served upon Lum and she had never seen the Employment Agreement between the Police Commission and Lum.

At the Ethics Board investigation, Michael Ching denied that he sought to solicit support for Lum. Commissioners Pa, Punua and Furtado testified that they were not aware of any attempt to solicit union assistance by Michael Ching, and that their votes in favor of Lum's appointment was based on their independent decision that Lum was the best qualified of the three applicants. Gonsalves testified before the Ethics Board that he had personal knowledge of the Fantasy Express matter as he knew all the officers disciplined and that he gave Lum the lowest ranking in

his evaluation of Lum's candidacy because of the Fantasy Express incident.

Mel Rapozo, as a member of the Council, voted to forward Yagihara's letter to the Board of Ethics. Rapozo met with Lieutenant Dean Pigao, who had suggested replacing all the then current members of the Police Commission with former police officers. Rapozo also asked Commissioner Carol Furtado how she could consider anyone who was involved in the Fantasy Express case.

In February 2005, Lum advised the Mayor and each member of the Council of his intent to submit a national origin discrimination complaint to the Hawaii Civil Rights Commission. On April 7, 2005, Lum filed with the Hawaii Civil Rights Commission a complaint for national origin discrimination in that Gonsalves' publicly referred to Lum by a "derogatory ancestral slur" and that the Council failed to take action on the Mayor's recommendation that Gonsalves be removed as a Police Commissioner.

Shortly thereafter, on April 28, 2005, the Council voted to retain Gonsalves as a Police Commissioner. Darryl Perry testified in support of Gonsalves. On January 30, 2006, Kauai Mayor Bryan Baptiste advised Lum that he, Baptiste, would recommend that the Police Commission remove Lum as the Kauai Police Chief.

Kauai County had appointed a Hearing Officer to hear and issue a Proposed Findings of Fact and Conclusions of Law ("Findings") as to whether Kauai Police Commissioner Michael Ching ("Ching") violated

the Kauai Code of Ethics in the selection of Plaintiff as interim and permanent Chief of Police. The Hearing Officer issued his Findings of Fact and Conclusions of Law and Hearing Officer's Report on February 23, 2006.

The Hearing Officer's Findings determined that the evidence showed there was doubt as to the fairness of the selection process, and that there was a bias on the part of some Commission members. However, Hearing Officer's Findings did not make any finding of misconduct or deficient performance of Lum.

On March 23, 2006, the Ethics Board advised the Council that based on its adoption of the Hearing Officer's Findings, it recommended that Lum's employment contract be cancelled. On April 12, 2006, the Council accepted and ratified the Ethics Board's recommendation that Lum's employment agreement be cancelled and forwarded its decision to Michael H. Tresler ("Tresler"), Director of Finance, Kauai County.

On April 27, 2006, Tresler advised Lum of the actions of the Ethics Board and the County Council and advised Lum of his intent to cancel Lum's Employment Agreement. On May 4, 2006, Lum, through his attorney, denied that he was involved in any misconduct committed by Michael Ching. Further, Lum stated that even if Ching had violated the Kauai County Code of Ethics, Lum's employment contract would have nevertheless been confirmed by the remaining and majority members of the Police Commission. Lum therefore demanded that he be given a due process hearing to permit him to confront and cross-examine any witness who may provide

evidence that Lum was involved in the alleged misconduct by Michael Ching.

During his deposition, Tresler admitted that he is a childhood friend of Todd Tanaka, a disciplined officer. He has known Mel Rapozo since he was young, did volunteer work for Mel Rapozo in Rapozo's political campaigns, and believed that Rapozo was smeared in the Fantasy Express matter. Tresler would meet regularly with police officers, police commissioners and Council members for breakfast after Lum was selected as the interim Chief, during the background investigation of the Chief's candidates, and after Lum was appointed as Chief of Police, and discussed the police department, Fantasy Express, and Lum's role as the Police Chief. Tresler expressed his concerns that Lum did not have administrative abilities and that the term "Hop-Sing" was blown out of proportion by the media, which has sought to sensationalize a conspiracy theory.

Tresler conferred with his Chief Procurement Officer who concluded that Lum's employment agreement was a "contract for services" and subject to his cancellation as opposed to a "personal employment contract," and not subject to cancellation. Tresler understood that Lum was demanding a hearing in which Lum wanted to confront and cross examine witnesses and present his own witnesses. Tresler further understood that Lum demanded a hearing prior to Tresler's decision to cancel Lum's employment contract.

On May 30, 2006, Tresler's attorney advised Lum that Tresler had cancelled Lum's employment contract

finding that based upon the Hearing Officer's Findings as adopted by the Ethics Board and accepted by the Council, Lum's employment contract was voidable. Tresler's decision was stated to have been made without any finding of misconduct on Lum's part, nor upon any deficiency in Lum's performance as Chief of Police.

As a result of the cancellation of his employment contract, Lum submitted his letter of retirement to the Police Commission effective June 7, 2006. Lum's decision to retire was based on his understanding that his eligibility to receive continued medical benefits after retirement, Lum had to leave his employment in good standing and not be involuntarily terminated.

Prior to his decision to cancel Lum's employment contract, on April 6, 2006, Tresler attended a County budget meeting of the County Council. When the meeting broke for lunch, Tresler was approached by a Richard Stauber in the County parking lot. Tresler questioned why Stauber supported Lum and the police department. Tresler's comments to Stauber indicated that Tresler wanted to speak negatively about Lum. The conversation turned to the County Council's refusal to remove Gonsalves as a Police Commissioner and that "we had to come up with another plan."

Tresler then stated that "we" went to the Ethics Board and removed Ching and that Ching would be fined some amount of money. Tresler then stated that "Carol Furtado will be next." Furtado had been charged with an ethics violation for selecting Lum. Furtado was not found to have committed an ethics

violation by the Hearings officer. The Ethics Board did not recommend Furtado's removal.

Lum's claims of race discrimination, retaliation for filing a race discrimination complaint and whistleblowing activities and allegations are not part of this Appeal in that these claims were dismissed by the Appeals Court and the trial court on the basis that Lum did not have a property interest in his continued employment as the Kauai police chief.

REASONS FOR GRANTING THE PETITION

A. Lum Had a Property Interest in his Position as the Kauai Police Chief

The Trial Court held that Lum was not entitled to due process in the matter of the decision by County Finance Director Tresler to cancel Lum's employment contract. The basis of Tresler's action was the wrong doing of a third party, Police Commissioner Michael Ching. The Court found that Lum had no "property interest" in his continued employment and that although Hawaii courts have not addressed the issue, other courts have held that Lum had no property interest in his continued employment.

The trial court erred. The Hawaii Supreme Court has addressed the issue that was presented to the Trial Court-whether the misconduct of a public board member invalidates the action of that public board. In *Waikiki Resort Hotel, Inc. v. City and County of Honolulu*, 63 Haw. 222, 624 P.2d 1353 (Haw. 1981), the Hawaii Supreme Court considered the question of whether the action of the public board was

invalidated by the participation of a "tainted" board member. The Hawaii Supreme Court considered opposing holdings by other courts and agreed with the holding in *Marshall v. Ellwood City Borough*, 189 Pa. 348, 41 A. 994 (1899) holding that the action of the Building Board of Appeals was not invalid on the basis that a board member had a conflict of interest where the decision did not depend upon the member's vote.

Likewise, in *Hui Malama Aina O Ko'olau v. Pacarro*, 4 Haw. App. 304, 666 P.2d 177 (Haw. App. 1983), the Hawaii Intermediate Court of Appeals considered the validity of the actions of the Honolulu City Council in a Council action in which a Councilman allegedly had a conflict of interest. In affirming the action of the City Council, the Hawaii Intermediate Court of Appeals stated that:

> Although Charter section 11-103 implicitly disqualified Fong from voting until he made the required disclosure, the Hawaii Supreme Court has held that "where the required majority exists without the vote of the disqualified member, his participation in the deliberation and in the voting will not invalidate the result." *Waikiki Resort Hotel, 63 Haw. at 248, 624 P.2d at 1371*; citing *Singewald v. Minneapolis Gas Co., 274 Minn. 556, 142 N.W.2d 739 (1966)*; *Anderson v. City of Parsons, 209 Kan. 337, 496 P.2d 1333 (1972)*. Since only five votes were necessary and Fong's was one of six votes, the extension of time until December 31, 1981 was not invalidated by Fong's vote.

666 P.2d 177 at 186.

In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed. 2d 494 (1985), a consolidated case, a security guard employed by a board of education was terminated for failure to disclose a prior felony conviction on his job application. In the second case, a school bus mechanic was terminated because he failed an eye examination. Both employees were classified as civil servants who could be terminated only for cause and both were entitled to post-termination administrative review of the decisions. However, neither employee was given a pre-termination opportunity to respond to the charges.

The district court dismissed both cases concluding that state statutory procedures for dismissal satisfied due process. The Sixth Circuit reversed, finding that the employees were entitled to a pre-termination hearing, and thus were deprived of due process. The employers appealed.

The U.S. Supreme Court in *Loudermill* agreed with the Sixth Circuit. It stated that property interests are not created by the Constitution, but "they are created and their dimensions are defined from an independent source such as state law....." The Court determined that Ohio law clearly created such interests for the employees. Moreover, the school board cannot escape its constitutional obligations by now claiming that the security guard had no property right under state law because he supposedly lied on his application. 470 U.S. 532 at 549, n. 5.

The Court in *Loudermill* further stated that an essential principle of due process is that a deprivation of life, liberty or property "be preceded by notice and

an opportunity for hearing appropriate to the nature of the case." The "root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Id.* at 542 (citations omitted). It further stated:

> The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.

470 U.S. 532 at 546.

In *McClure v. Independent School District No. 16, Mayes County, Okla.*, 228 F.3d 1205 (10th Cir. 2000), plaintiff was employed as a school principal who received a pay increase for her work at the district superintendent's recommendation and school board's approval. The board later began questioning the increased payments to plaintiff. At the board's direction, the new superintendent gave plaintiff written notice proposing her removal for specified misconduct and suspended her with pay. Plaintiff requested a due process hearing. Plaintiff and her counsel appeared at the hearing and objected to participation of the five School Board members due to bias, and particularly the

participation of two Board members who had previously expressed a bias against plaintiff.

The district's counsel sought to introduce affidavits from thirteen district employees making various accusations against plaintiff. Plaintiff's counsel then moved to have the affidavits barred on the grounds that their admission denied her the right to cross-examination. The district's counsel responded that the affiants refused to appear in person, and he had no subpoena power to force their attendance. The Board eventually went into executive session, and returned to vote unanimously for plaintiff's dismissal. Plaintiff sued the district and the five Board members under 42 U.S.C. § 1983 for violation of her constitutional right to due process.

The district court granted summary judgment for plaintiff on her claim that the due process hearing was rendered constitutionally inadequate by her inability to confront and cross-examine adverse witnesses. It also determined that plaintiff presented a fact issue on her allegation that she was denied the right to an impartial tribunal because two of the five Board members at the hearing were biased against her, but determined this claim moot by its holding on the confrontation claim.

The Tenth Circuit in *McClure* noted it had previously indicated in dicta that:

> a full post-termination hearing is understood to include the right to representation by an attorney and the right to cross-examine adverse witnesses.

* * *

> ... whether the Due Process Clause requires that the terminated employees be offered the right to cross-examination or confront witnesses depends upon the significance and nature of the factual disputes at issue.

228 F.3d 1205 at 1211 (citation omitted).

The Tenth Circuit in *McClure* determined that in light of the uncontroverted evidence of the seriousness of the charges, and the risk of error supported its conclusion that due process required cross-examination here. 228 F.3d 1205 at 1212.

In *Sanchez v. City of Santa Ana*, 915 F.2d 424 (9th Cir. 1990), defendant police department removed the merit pay of plaintiff police officer. Plaintiff advised his superiors that he wanted to contest the removal of his merit pay and requested a written statement of the charges against him without success. Plaintiff sued the city and police department alleging in part that the removal of his merit pay constituted a demotion without due process, in violation of 42 U.S.C. §1983. The District Court granted summary judgment for plaintiff, concluding that the city denied plaintiff due process in removing his merit pay, and that the denial violated 42 U.S.C. §1983.

The Ninth Circuit in *Sanchez* noted that property interests are "created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." In

order to have a property interest in a benefit, a person must demonstrate that he has a legitimate claim of entitlement to it, not merely a unilateral expectation. 915 F.2d 424 at 428.

In Sanchez's case, plaintiff correctly cited to the city charter's grievance procedure in effect at the time he began receiving merit pay, created a constitutionally protected property interest in merit pay. The provision treated a reduction in pay as a demotion, and, by providing that an employee may be demoted for certain specified reasons, implicitly restricts the city's authority to demote an employee to the specified reasons. Thus, plaintiff had a vested property right to merit pay at the time he began receiving it under the city charter. The Court held that the city could not arbitrarily take away plaintiff's right to continued receipt of merit pay by later amending the charter.

The Ninth Circuit in *Sanchez* also rejected the city's contention that the procedures it followed in removing plaintiff's merit pay satisfied due process. Plaintiff did not contend, nor must he contend, that he should have been given a pre-removal hearing. He was entitled to an administrative appeal, or a post-removal hearing, to challenge the final decision to eliminate his merit pay. As plaintiff was not given any opportunity for a hearing of any kind, his property interest was taken without due process. 915 F.2d 424 at 430.

Here, Plaintiff's employment agreement and the County Charter specifically gave him due process rights if he were to face termination. Plaintiff's employment agreement states:

> 3. Termination. Your services may be terminated as follows:
>
> (a) Pursuant to Charter: by the commission at any time prior to expiration of the term of your employment under this agreement after being given a written statement of the charges against you and a hearing before the commission pursuant to Section 11.04 of the Charter.

Lum has referred the trial court's attention to the factually similar holding in *In the Matter of N et. al. v. New York City Board of Ethics*, 139 Misc. 2d 634, 528 N.Y.S. 2d 794 (Sup. Ct. N.Y.-1987). In *In the Matter of N et. al.*, the plaintiff was a developer, who, in reliance to the City Board of Ethics opinion that there was no conflict of interest for a City official to invest in his project, allowed the City official to invest in his project. The City Board of Ethics later concluded to such an action by the City official was an ethics violation and thus the City sought to cancel the sales contract entered into by the Developer and the City.

The developer brought an action to vacate the second ruling of the City Board of Ethics. The court agreed with the developer, ruling that if the opinion could be used as a basis of deprivation of property rights, then the developer was entitled to be notice and an opportunity to be heard. In the instant case, Lum was not afforded an opportunity to be heard in the proceeding which found that Michael Ching had violated an Ethics provision of the County of Kauai.

When the County sought to cancel the employment contract secured by Lum with the County, the County of Kauai, through Michael Tresler, denied Lum the opportunity to present evidence that he was not aware misconduct of Ching, but also, the testimony of the remaining Commissioners that they were not aware of Ching's misconduct and voted accordingly.

Lastly the decision by Tresler that Lum's contract was a "contract for services" subject to his cancellation, and not a "personal employment contract" not subject to cancellation is suspect given the admitted partially by Tresler.

B. Tresler was not an Impartial Decision Maker

The Due Process Clause of U.S. Const. Amend. XIV prevents the state from depriving a plaintiff of a protected property interest without "a fair trial in a fair tribunal." A fair trial in a fair tribunal is a basic requirement of due process. *Stivers v. Pierce*, 71 F.3d 732 (9th Cir. 1995). Fairness requires an absence of actual bias in the trial of cases. But the system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. This requirement applies not only to courts, but also to state administrative agencies.

There are two ways in which a plaintiff may establish that he has been denied his constitutional right to a fair hearing before an impartial tribunal. In some cases, the proceedings and surrounding

circumstances may demonstrate actual bias on the part of the adjudicator. In other cases, the adjudicator's pecuniary or personal interest in the outcome of the proceedings may create an appearance of partiality that violates due process, even without any showing of actual bias. In *Bakalis v. Golembeski*, 35 F.3d 318 (7th Cir. 1994), plaintiff college president sued the individual board of trustee members for terminating him without due process. Plaintiff alleged that prior to his termination, certain board members had prejudged him and thus did not give him a fair and impartial hearing.

The Seventh Circuit in *Bakalis* agreed and stated:

> according to Supreme Court and Court of Appeals precedents, due process requires a hearing by an impartial tribunal. Partiality will not be presumed simply because the same tribunal investigates and adjudicates the employment decisions. Furthermore, there is a presumption that those making decisions affecting the public are doing so in the public interest. However, bias and partiality become very real problems if the tribunal has been the target of criticism or abuse from those coming before it. Certainly, a body that has prejudged the outcome cannot render a decision that comports with due process.

35 F.3d 318 at 325-326, *see also*, *Hall v. Marion School District*, 31 F.3d 183 (4th Cir. 1994) (In a Section 1983 free speech action, School District Superintendent's disparaging comments about plaintiff's teacher tainted

any unbiased views of the school board members may have had determining to terminate teacher.)

The Seventh Circuit in *Bakalis* determined that the record reflected that a "running controversy" between the board members that precluded impartial adjudication. Plaintiff had confronted the individual board members concerning their actions, and told them that their conduct not only harmed the college, but also was unethical. Some board members asked plaintiff to resign before the hearing in which they would determine whether he should be dismissed. Moreover, at least one board member made public statements questioning plaintiff's qualification to be president. Thus, there was evidence that board members had prejudged plaintiff's fate before the hearing. This prejudgment, if it existed, rendered the hearing violative of due process. *Bakalis*, 35 F.3d 318 at 326.

In the instant case, Tresler's denial of Lum's due process is even more critical given that his termination was clearly not predicated solely upon the recommendation of the Ethics Commission. There is ample testimony from Tresler himself that he held a bias against Lum which stemmed from the 1995 "Fantasy Express" incident in which Lum reported five police officers after he heard a statement from a suspect arrested for prostitution that she had been sexually assaulted by the five officers.

C. The Lower Courts Gave Preclusive Effect to a Hearing Officer's Ruling Made as a Result of a Hearing in Which Lum Was Not a Party .

The trial court, in its order dismissing Lum's claim of due process denial wrote:

> Some time before February 23, 2006, the County appointed a hearing officer to hear and issue findings of fact and conclusions of law on whether Commissioner Ching had violated the Kauai County Charter and the Kauai County Code of Ethics in approving Lum to be Chief of Police.
>
> On February 23, 2006, the hearing officer issued his findings and recommendations. Id. at 23. The hearing officer found that Commissioner Ching "actively solicited support for Lum from [the State of Hawaii Organization of Police Officers('SHOPO')]" and that he "used his position to secure an unwarranted advantage and treatment for [Lum] over the other candidates for Chief of Police." In light of those findings, the hearing officer concluded, "In nominating, advocating for and voting for [Lum] as Interim Chief, [Commissioner Ching] used his official position for the benefit of [Lum] and thereby violated the Kauai County Code of Ethics under the Kauai County Charter, Article XX,Section 20.02E and the Kauai County Code, Chapter 3, Article I, section [3]-1.6 ('Fair Treatment')." The hearing officer recommended

> that "this matter be referred to the County Council for appropriate action."

Appendix at 74a-75a. (Court's references to Exhibits omitted)

The Hearing Officer recommended that the matter against Michael Ching be referred to the County Council. The Ethics Board recommended by Ching be fined and that the employment contract of Lum be cancelled. The Board's recommendation was unanimously adopted by the Kauai County Council.

Lum objected to the adoption by the trial court of the decision of a Hearing Officer, who rendered his findings at to Michael Ching, in a proceeding in which the Hearing officer was addressing the wrongdoing by Michael Ching.

That the hearing officer's finding in Michael Ching's hearing was adopted by the trial court can be readily seen in her conclusions of law, in which she stated:

> The hearing officer concluded that Commissioner Ching violated the Kauai County Code and the Kauai County Code of Ethics by "nominating, advocating for and voting for [Lum] as Interim Chief." Based on the hearing officer's findings and recommendations, the Board of Ethics recommended to the Council that Director Tresler void Lum's employment contract. The Council, having accepted and ratified the Board of Ethics' recommendations, referred "the matter of the cancellation of [Lum's]

> employment contract to" Director Tresler." Pursuant to section 3-1.11(a) of the Kauai County Code, Director Tresler concluded, after fully considering Lum's interests, that Lum's employment contract was "voidable."

Appendix 84a-85a (Court's references to Exhibits omitted)

The Appeals Court in its decision affirming the trial court's ruling, wrote:

> The district court correctly determined that Lum did not have a property interest in his employment and thus, does not have a viable due process claim. Lum's employment agreement was tainted by the ethical violations by one of thepolice commissioners, so it was illegal and void ab initio.

In *Alexander v. Gardner-Denver Co*, 415 U.S. 36, 39 L. Ed. 2d 174 (1974), this Court held a party was not bound by an arbitrator's finding of good cause for discharge on that same party when he initiated a Title VII action alleging race discrimination as to the basis of his discharge. In *Alexander*, this Court declined to adopt a rule that would have required federal courts to defer to an arbitrator's decision on a discrimination claim, when: (i) the claim was before the arbitrator; (ii) the collective bargaining agreement prohibited the form of the discrimination charged in the suit under Title VII and (iii) the arbitrator has the authority to rule on the claim and to fashion a remedy.

The lower courts' ruling violates the holding of *McDonald v. City of West Branch, Michigan*, 466 U.S. 284, 104 S. Ct. 1799, 80 L. Ed. 2d 302 (1984) that the federal courts should not afford res judicata or collateral estoppel to an award in an arbitration proceeding brought pursuant to the terms of a CBA. Lum would submit that the *McDonald* holding is applicable to the instant case in that he was not a participant to the hearing in which the hearing officer found that the selection was "tainted," that the other members of the Police Commission were likewise unaffected by the misconduct of Police Commissioner Ching, and further, a due process hearing was required under the terms of his employment contract and the provisions Kauai County Charter.

Finally, Lum would direct this Court's attention to its decision in *Martin v. Wilkes*, 490 U.S. 755, 104 L.Ed.2d 835 (1989), in which this Court permitted an action by White firefighters who were not parties to prior civil rights litigation, to challenge, as discriminatory, promotion decisions made pursuant to the prior litigation consent decrees. Former Chief Justice Rehnquist based his ruling on "the principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." 490 U.S. 755 at 762.

Lum further submits that his entitlement to a due process hearing for the purpose of clearing his good name, reputation, honor and integrity, namely, that his selection was "tainted." *Wisconsin v. Constantineau*, 400 U.S. 433; 91 S. Ct. 507 (1971).

CONCLUSION

It is submitted that Lum's right to a due process hearing was not satisfied by findings rendered in the hearing involving a third party. Additionally, Lum has produced admission by Tresler showing that Tresler was not an impartial decision-maker as to Lum's continued employment. Lastly, Lum would submit that it was error for the lower courts to adopt the findings of a hearing officer in a proceeding in which Lum was not a participant.

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted:

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(any footnotes trail end of each document)

No. 08-16093

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KING C. LUM,
Plaintiff - Appellant,

v.

KAUAI COUNTY COUNCIL; BRYAN BAPTISTE, individually, and in his capacity as the Mayor of Kauai County, State of Hawaii; LEON GONSALVES, SR., individually, and in his capacity as a Commissioner, Kauai Police Commission; MICHAEL H. TRESLER, individually, and in his capacity as the Director of Finance, Kauai County; KAUAI COUNTY; and JOHN DOES 1 to 20 and JANE DOES 1 to 20,
Defendants - Appellees.

October 14, 2009, Argued and Submitted, Honolulu, Hawaii

December 1, 2009, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Appeal from the United States District Court for the District of Hawaii. D.C. No. 1:06-cv-00068-SOM-LEK.

COUNSEL: For KING C. LUM, Plaintiff - Appellant: Clayton Ikei, JERRY P.S. CHANG, LAW OFFICE OF CLAYTON C. IKEI, Honolulu, HI.

For KAUAI COUNTY COUNCIL, BRYAN BAPTISTE, individually, and in his capacity as the Mayor of Kauai County, State of Hawaii, Defendants - Appellees: Matthew S.K. Pyun, Jr., Esquire, Attorney, Office of the County Attorney, Lihue, HI; Gregg Minoru Ushiroda, WATANABE ING KAWASHIMA & KOMEIJI LLP, Honolulu, HI; Gregg Minoru Ushiroda, Watanabe Ing LLP, Honolulu, HI; John T. Komeiji, Esquire, Attorney, WATANABE ING & KAWASHIMA, Honolulu, HI.

For MICHAEL H. TRESLER, KAUAI COUNTY, Defendant - Appellee: Matthew S.K. Pyun, Jr., Esquire, Attorney, Office of the County Attorney, Lihue, HI; Gregg Minoru Ushiroda, WATANABE ING KAWASHIMA & KOMEIJI LLP, Honolulu, HI; Gregg Minoru Ushiroda, Watanabe Ing LLP, Honolulu, HI; John T. Komeiji, Esquire, Attorney, WATANABE ING KAWASHIMA & KOMEIJI, Honolulu, HI.

For LEON GONSALVES, Sr., Defendant - Appellee: Diane W. Wong, Attorney, Richard F. Nakamura, AYABE CHONG NISHIMOTO SIA & NAKAMURA, Honolulu, HI.

Before: BEEZER, GRABER and FISHER, Circuit Judges.

MEMORANDUM *

King C. Lum appeals the district court's summary judgment in favor of the defendants, as well as the district court's affirmance of the magistrate judge's order denying Lum's motion to compel discovery. We

have jurisdiction under 28 U.S.C. § 1291, and we affirm the district court in all respects.

I. Lum's Motion To Compel Discovery

Having reviewed the minutes in camera, we hold that the district court did not clearly err in affirming the magistrate judge's order denying Lum's motion to compel discovery of the Kauai County Council's Executive Session 177 minutes. Lum relies on an opinion letter from the Hawaii Office of Information Practices (OIP) stating that only a limited portion of the minutes was covered by the attorney-client privilege. The magistrate judge could reasonably have disagreed with OIP's review of the minutes or concluded that the privileged material was so intertwined with nonprivileged material that redaction would be ineffective.

II. Lum's Due Process, Breach of Contract and Violation of Public Policy Claims

The district court correctly determined that Lum did not have a property interest in his employment and, thus, does not have a viable due process claim. Lum's employment agreement was tainted by ethical violations by one of the police commissioners, so it was illegal and void ab initio. *Cf. Peine v. Murphy*, 46 Haw. 233, 377 P.2d 708, 712 (Haw. 1962) (holding that an agreement vitiated by fraud is void ab initio). A void contract cannot give rise to a property interest. *See Bollow v. Fed. Reserve Bank of S.F.*, 650 F.2d 1093, 1099 (9th Cir. 1981).

Accordingly, we need not consider whether Kauai County Code section 3-1.11(a) would have rendered this contract voidable. Moreover, Lum did not raise the argument that a contract that was merely voidable should be treated differently from one that was void ab initio. Thus, we do not decide whether a voidable contract could create a property interest sufficient for a due process claim. Nor do we address Lum's breach of contract and public policy claims, which the district court ruled were similarly defeated because the employment agreement was void. Lum has abandoned any challenge to these rulings on appeal. *See United States v. Kimble*, 107 F.3d 712, 715 n.2 (9th Cir. 1997).

III. Lum's Claims Against Tresler

The district court correctly determined that Lum raised no issue of material fact in his civil conspiracy claim against Michael Tresler. *See* 42 U.S.C. § 1985 (requiring a conspiracy to deprive a plaintiff of the equal protection of the laws). Because Lum has alleged no facts suggesting that Tresler acted on the basis of racial or class-based animus, we affirm the district court's summary judgment in favor of Tresler. *See Bretz v. Kelman*, 773 F.2d 1026, 1028-30 (9th Cir. 1985) (en banc).

IV. Lum's Claims Against Gonsalves

The district court correctly determined that Lum raised no issue of material fact in his several claims against Leon Gonsalves, Sr. First, there is no individual liability under Title VII, 42 U.S.C. § 2000e-2, et seq. *See Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587-88 (9th Cir. 1993). Second, there is no individual liability under

Hawaii Revised Statutes § 378-2(1)(A) and (2). We agree with the district court's analysis of the Hawaii statute's language, particularly in light of its parallels to Title VII. On Lum's section 378-2(3) claim, where individual liability is proper, Lum failed to provide any evidence that Gonsalves aided and abetted any discriminatory action.

Third, the district court properly granted summary judgment on Lum's 42 U.S.C. § 1981 claims. The evidence that Lum presented shows no more than "isolated incidents" that do not support a hostile work environment claim. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998). Moreover, Lum does not have a viable retaliation claim because he has not shown that Gonsalves took any adverse employment action as required by *Surrell v. Cal. Water Service Co.*, 518 F.3d 1097, 1108 (9th Cir. 2008).

Fourth, the district court properly granted summary judgment on Lum's § 1985 claim against Gonsalves. Even assuming that Lum could show that Gonsalves was racially motivated based on his use of a derogatory nickname, we conclude that Lum offered no evidence of a conspiracy between Gonsalves and anyone else to deprive Lum of equal protection.

Fifth, the district court ruled that there is no individual liability under the Hawaii Whisteblowers' Protection Act. Haw. Rev. Stat. § 378-62. But even if there is individual liability, it can attach at most to an agent of the employer. *See id.* § 378-61. Lum failed to provide evidence that Gonsalves should be considered an of Lum's employer, Kauai County, much less that

Gonsalves's retaliatory actions were taken in his capacity as an agent.

KING C. LUM, Plaintiff, vs. KAUAI COUNTY COUNCIL, et al., Defendants.

Civ. No. 06-00068 SOM/LEK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

KING C. LUM, Plaintiff,

vs.

KAUAI COUNTY COUNCIL, et al., Defendants.

November 7, 2007, Decided
November 7, 2007, Filed
As Amended November 9, 2007.

Susan Oki Mollway, United States District Judge.

AMENDED ORDER GRANTING THE MOTION FOR SUMMARY JUDGMENT FILED BY DEFENDANT LEON GONSALVES, SR.

I. INTRODUCTION.

This case asserts race-based employment discrimination. This court previously granted summary judgment against Plaintiff King C. Lum on the Fourth Claim for Relief in his Fourth Amended Complaint. The court subsequently granted summary judgment in favor of Michael H. Tresler, leaving for further adjudication the First, Second, Third, and Fifth Claims for relief, to the extent those claims were asserted against Defendants County of Kauai, Kauai County Council, Bryan Baptiste, and Leon Gonsalves, Sr.

Gonsalves now moves for summary judgment on all

remaining claims against him in the Fourth Amended Complaint. Those claims allege violations of Title VII, Haw. Rev. Stat. §§ 378-2 and 378-62, and 42 U.S.C. §§ 1981 and 1985. This court rules in Gonsalves's favor on all counts.

II. LEGAL STANDARD.

The summary judgment standard was set forth in this court's order of May 18, 2007. That standard is incorporated herein by reference.

III. BACKGROUND FACTS.

The factual background was also set forth in this court's order of May 18, 2007. That factual background is incorporated by reference and is supplemented herein as necessary.

In brief, Lum, who is of Chinese ancestry, was the former Chief of Police for the County of Kauai. Gonsalves was a member of the police commission that, in 2004, appointed Lum to a five-year term, although Gonsalves opposed Lum's appointment. Lum's appointment was rescinded after the Kauai County Council adopted a recommendation to cancel the contract based on findings that another commissioner had improperly influenced the process of selecting the chief. Lum could have remained on the police force but, instead resigned.

While still employed by the County, Lum had complained that Gonsalves had used a racially derogatory term by referring to him in an email as "Hop

Sing." That email figures prominently in Lum's present discrimination claims.

IV. ANALYSIS.

A. The First and Second Claims for Relief.

1. There is No Individual Liability for the Alleged Title VII Violations.

The Fourth Amended Complaint's First Cause of Action asserts that Gonsalves violated Title VII, which provides:

> (a) It shall be an unlawful employment practice for an employer –
>
> (b)
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (emphasis added).

The Supreme Court has stated that an employer violates Title VII when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive or hostile working environment. See *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 78, 118 S. Ct.

998, 140 L. Ed. 2d 201 (1998); see also *Montero v. AGCO Corp.*, 192 F.3d 856, 860 (9th Cir. 1999).

Although Gonsalves did not argue in his summary judgment motion that he cannot be held individually liable for the alleged Title VII violations asserted in Lum's First Claim for Relief, this court, in its usual prehearing inclinations, asked Lum to come to the hearing on the motion prepared to discuss whether Gonsalves could be held individually liable for a violation of Title VII. At the hearing, Lum conceded that he lacks a viable Title VII claim against Gonsalves. See *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587-88 (9th Cir. 1993) ("Congress did not intend to impose individual liability on employees . . . . If Congress decided to protect small entities with limited resources from liability, it is inconceivable that Congress intended to allow civil liability to run against individual employees"); *Chenoweth v. Maui Chem. & Paper Prods.*, 2007 U.S. Dist. LEXIS 63632, 2007 WL 2479297, *2 (D. Haw. 2007) ("The Ninth Circuit has conclusively determined that Title VII does not impose individual liability on employees, supervisory or otherwise, which this Court has recognized."); see also 42 U.S.C. § 2000e(b) (defining "employer," for Title VII purposes, as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person"). Gonsalves cannot be individually liable Under Title VII.

2. Haw. Rev. Stat. § 378-2.

The First Cause of Action in the Fourth Amended

Complaint also asserts violations of section 378-2 of the Hawaii Revised Statutes. Lum fails show that he could support a section 378-2 claim.

a. Gonsalves is Not Liable for Alleged Violations of Haw. Rev. Stat. § 378-2(1)(A).

Lum alleges that Gonsalves has discriminated against him because of his race. See Fourth Amended Complaint (May 8, 2007) ¶ 25 (alleging that Gonsalves sent an email in which Gonsalves called Lum "Hop Sing," an alleged racial slur). Lum argues that Gonsalves created a hostile work environment through the use of the term "Hop Sing" in an email and subsequently filed complaints against Lum with the County of Kauai Board of Ethics and the State of Hawaii's Attorney General's office. Lum appears to be asserting a violation of section 378-2(1)(A) of the Hawaii Revised Statutes. [1]

In relevant part, section 378-2 provides:

> It shall be an unlawful discriminatory practice:
>
> (1) Because of race, sex, sexual orientation, age, religion, color, ancestry, disability, marital status, or arrest and court record:
>
> (A) For any employer to refuse to hire or employ or to bar or discharge from employment, or otherwise to discriminate against any individual in compensation or in the terms, conditions, or privileges of employment;
>
> (B) For any employment agency to fail or refuse

to refer for employment, or to classify or otherwise to discriminate against, any individual;

(C) For any employer or employment agency to print, circulate, or cause to be printed or circulated any statement, advertisement, or publication or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification, or discrimination;

(D) For any labor organization to exclude or expel from its membership any individual or to discriminate in any way against any of its members, employer, or employees; or

(E) For any employer or labor organization to refuse to enter into an apprenticeship agreement as defined in section 372-2; provided that no apprentice shall be younger than sixteen years of age;

(2) For any employer, labor organization, or employment agency to discharge, expel, or otherwise discriminate against any individual because the individual has opposed any practice forbidden by this part or has filed a complaint, testified, or assisted in any proceeding respecting the discriminatory practices prohibited under this part;

(3) For any person whether an employer, employee, or not, to aid, abet, incite, compel, or coerce the doing of any of the discriminatory

> practices forbidden by this part, or to attempt to do so . . . .

No Hawaii appellate court has expressly addressed the issue of whether there is individual liability under section 378-2. By contrast, the judges of this district court have, on numerous occasions, examined the issue of individual liability under sections 378-2(1) and 378-2(2), both of which use the term "employer" with the same definition. [2] This district's judges are split on the issue.

Past Decisions in this District.

At this point, Judge Ezra and this judge have ruled that there is no individual liability under section 378-2, except under subsection 378-2(3), which concerns aiding, abetting, inciting, compelling, or coercing discrimination. See, e.g., *Lavarias v. Hui O'Kakoa Sec.*, 2006 U.S. Dist. LEXIS 86005, 2006 WL 3422256 (D. Haw. Nov. 28, 2006) (Ezra, J.); *Maizner v. Haw., Dep't of Educ.*, 405 F. Supp. 2d 1225, 1235 (D. Haw. 2005) (Mollway, J.); *White v. Pac. Media Group*, 322 F. Supp. 2d 1101, 1114 (D. Haw. 2004) (Ezra, J); *Luzon v. Atlas Ins. Agency*, 284 F. Supp. 2d 1261, 1265 (D. Haw. 2003) (Mollway, J.); *Mukaida v. Hawaii*, 159 F. Supp. 2d 1211, 1226 (D. Haw. 2001) (Mollway, J.). But see *Black v. Correa*, 2007 U.S. Dist. LEXIS 69861, 2007 WL 3195122, *18 (D. Haw. Oct. 30, 2007) (Ezra, J.) (finding individual liability under section 378-62, while not revisiting rulings regarding section 378-2).

Judges J. Michael Seabright, Alan C. Kay, and Samuel P. King have determined that section 378 2 does indeed impose individual liability. See, e.g., *Hale v. Haw.*

Publs., Inc., 468 F. Supp. 2d 1210, 1229 (D. Haw. 2006) (Kay, J.); *Sherez v. State of Haw. Dep't of Educ.*, 396 F. Supp. 2d 1138, 1145 (D. Haw. 2005) (Seabright, J.); *Black v. City & County of Honolulu*, 112 F. Supp. 2d 1041, 1056-57 (D. Haw. 2000) (King, J.); accord *U.S. ex rel. Lockyer v. Haw. Pac. Health*, 490 F. Supp. 2d 1062, 1087 (D. Haw. 2007) (Kay, J.) (applying the same reasoning to a Whistleblower's Protection Act claim under Haw. Rev. Stat. § 378-62 to find individual liability).

A split with her colleagues guarantees that this judge fully revisits the issue each time it comes up in her cases. Despite her great respect for the colleagues who differ with her, this judge adheres to the reasoning in *Lavarias*, *Maizner*, *White*, *Luzon*, and *Mukaida* and rules that Gonsalves cannot be held individually liable under section 378-2(1) for the alleged hostile work environment he allegedly created by his using the term "Hop Sing."

Section 378-2(1) prohibits an "employer" from discriminating against a person based on his or her race, as well as other protected categories. "Employer" is defined as "any person, including the State or any of its political subdivisions and any agent of such person, having one or more employees, but shall not include the United States." Haw. Rev. Stat. § 378-1. The disagreement among the judges in this district centers around whether an individual is an "employer."

In 2000, Judge King ruled in his *Black* case that an individual employee may be held liable for violations of chapter 378 of the Hawaii Revised Statutes. See *Black*,

112 F. Supp. 2d at 1056-57. In 2001, this court disagreed with *Black*, ruling that,

> if called upon to decide the issue, Hawaii appellate courts would likely follow the federal courts' reasoning in Title VII cases and rule that, under Chapter 378, unless an individual actually employs someone, the individual cannot be liable for quid pro quo harassment or hostile work environment discrimination because the individual is not an "employer."

Mukaida, 159 F. Supp. 2d at 1227. The court distinguished *Black*, noting that Black had heavily relied on *Steinberg v. Hoshijo*, 88 Haw. 10, 18 n.10, 960 P.2d 1218, 1226 n.10 (1998). *Black* indicated that *Steinberg* provided "a strong indication that the Hawaii Supreme Court would interpret [chapter 378] to hold individual employees liable if the issue were put before it." This court did not read *Steinberg* the same way, noting that Steinberg only stated, in dicta in a footnote, that the parties did not dispute that *Steinberg* was an agent of the employing company and therefore an employer for purposes of section 378-1 (defining "employer" to include "any person . . . and any agent of such person, having one or more employees"). Nor was this court persuaded by *Black*'s reliance on two cases decided by the Hawaii Civil Rights Commission, as "courts are not . . . bound by the findings of the HCRC." *Takaki v. Allied Mach. Corp.*, 87 Haw. 57, 68, 951 P.2d 507, 518 (Ct. App. 1998).

As this judge noted in 2003 in *Luzon*, the Hawaii Supreme Court, subsequent to this court's *Mukaida* decision,

> addressed a claim against individual employees under chapter 378. In *Schefke v. Reliable Collection Agency, Ltd.*, 96 Haw. 408, 32 P.3d 52 (Haw. 2001), the Hawaii Supreme Court reversed the trial court's grant of directed verdicts to two individuals who had been sued for retaliating against the plaintiff after he filed an employment discrimination claim. *Schefke* permitted claims against one individual who was both an owner and a supervising employee, and against another individual who allegedly incited the alleged retaliation.

Luzon, 284 F. Supp. 2d at 1265. In footnote 1 of *Luzon*, this court discussed in detail the *Schefke* opinion, noting that it was not at all clear that the Hawaii Supreme Court was addressing individual liability under sections 378-2(1) and 378 2(2), rather than under section 378 2(3), which, unlike sections 378-2(1) and 378-2(2), expressly permits claims against individuals. *Id.* at 1265 n.1. In any event, the individual defendants in *Schefke* had actually been owners of the company. *Id. Schefke* certainly did not hold that a co-worker could be held liable for creating a hostile work environment through the co-worker's use of racial slurs. Lum's reliance on *Schefke* is therefore unpersuasive.

In 2004, Judge Ezra noted "the divide in opinion within the district court" and stated that he "ultimately concurs" with this judge's decision in *Luzon*. As Judge Ezra put it, "[T]he [Hawaii] legislature intended to include employees as personally liable pursuant to § 378-2(3)[the aiding and abetting provision], and not personally liable for a violation of the statute in general." *White*, 322 F. Supp. 2d at 1114. *White* agreed

with this judge's analysis in *Luzon* that the Hawaii legislature, had it intended that individuals be liable under section 378-2(1) or section 378-2(2), could have easily said so:

> Throughout Chapter 378, the legislature has described which behavior, when committed by an "employer," "employment agency," or "labor organization," constitutes an unlawful discriminatory practice. Only in Section 378-2(3) did the legislature include the broad reference to "any person whether an employer, employee, or not" as being liable for the specific action of aiding, abetting, inciting, compelling, or coercing discriminatory actions. H.R.S. Chapter 378. As the court stated in *Luzon*, the legislature "clearly knew how to include employees within a statute's scope" and its failure to do so explicitly throughout the statute suggests that employees are only held liable for infractions of § 378-2(3). 284 F. Supp. 2d at 1265 n.1.

White, 322 F. Supp. 2d at 1114. Notably, Judge Ezra was not persuaded that the individual defendant in *White*, who was the plaintiff's supervisor, should be subjected to individual liability just because he was in a managerial position. *Id.* at 1114. Judge Ezra recognized that it was theoretically possible that the defendant supervisor could have been an aider or abettor of discrimination and therefore individually liable under section 378-2(3), but Judge Ezra found no facts supporting aiding and abetting liability. *Id.* at 1114-15.

In 2005, Judge Seabright disagreed with Judge Ezra's decision in *White* and with this judge's decisions in

Mukaida and *Luzon*. Judge Seabright ruled that, under section 378-2(1) and section 378-2(2), "individuals are subject to liability under § 378-2 when they act as agents of an employer." *Sherez*, 396 F. Supp. 2d at 1146. Recognizing that the definition of "employer" in section 378-1 was "not a model of clarity," Judge Seabright examined the use of the term "employer" in chapter 378 and concluded that "Chapter 378 casts liability for employment discrimination broadly." *Id.* at 1147. Judge Seabright reasoned, "It is hard to imagine that the Hawaii legislature meant to impose liability on small employers and on individuals who aid and abet discrimination, yet at the same time meant to immunize the individual agents who actually engage in unlawful discrimination." *Id.*

Later that same year, this judge again ruled that sections 378-2(1) and 378-2(2) did not impose individual liability. In *Maizner*, 405 F. Supp. 2d at 1235-37, this judge studied the grammar of the definition of "employer" set forth in section 378-1, concluding, contrary to *Sherez*, that the definition of "employer" did not impose individual liability under section 378-2(1) or section 378-2(2). This judge reasoned that the participial phrase "having one or more employees" in section 378-1 restrictively modified "any person" such that the definition of "employer" could not be read to include individuals who did not have employees.

Maizner also responded to Judge Seabright's ruling in *Sherez*:

> *Sherez* notes, "It is hard to imagine that the Hawaii legislature meant to impose liability on small employers and on individuals who aid and

abet discrimination, yet at the same time meant to immunize the individual agents who actually engage in unlawful discrimination." 296 F. Supp. 2d at 1147.

But this judge's reading of section 378 2(2) does not actually "immunize" individual employees; section 378-2(2) simply does not extend to them. Individual employees remain liable for wrongdoing under other laws that they may have violated. Thus, for example, individuals may be liable for race discrimination under 42 U.S.C. § 1981 even if they are not employers. An individual employee who assaults another employee based on the victim's sex may face an intentional tort claim.

Section 378-2(3), by contrast, extends aider and abettor liability to individual employees in the same way that it extends such liability to persons outside of the employee-employer relationship. The legislature could legitimately decide to reserve certain laws for certain relationships, while viewing other laws as properly extending beyond those relationships. After all, the legislature had to realize that if it drafted section 378-2 to allow employees to freely sue each other for employment discrimination, that might not necessarily be employee-friendly. For every plaintiff employee benefitting from such a provision, there would be a corresponding defendant employee, and at least one employee in each such dispute would be at risk of losing.

There is nothing illogical about a legislative

> decision to address systemic discrimination by passing employment discrimination laws, but not to seek to use those laws to curb individual employees who may be renegades acting badly without an employer's backing. An employer has power over an employee, and two or more individuals may similarly enjoy power over a single employee. As aiding or abetting discrimination requires at least two actors, it may present something akin to the systemic imbalance of power that the legislature may have been concerned with in the relationship between employer and employee. . . .
>
> Finally, *Sherez* takes the position that individual employee liability under section 378.2(2) is consistent with chapter 378's application to employers with one or more employees, in contrast to Title VII's application to employers with fifteen or more employees. But chapter 378's broad application even to small employers could be said to make individual employee liability an even less necessary remedy than is the case with Title VII.

Id. at 1257–58.

In November 2006, Judge Ezra, in *Lavarias*, reiterated the position he had taken two years earlier in *White*, again holding that employees, even if they were supervisors, were not individually liable for violations of section 378.2(2). See *Lavarias*, 2006 U.S. Dist. LEXIS 86005, 2006 WL 3422256 at *2. Laverne Lavarias, a security guard, had sued George Williams, the person allegedly responsible for the hiring, firing,

and training of guards. See Complaint, Civil No. 06-00481 DEA/LEK (Sept. 6, 2006) P 3 (available on this court's CM/ECF system as document number 1 of the case file). Judge Ezra ruled that Williams could not be personally liable under section 378-2(2) and that Lavarias had not shown that Williams had aided or abetted discrimination in violation of section 378-2(3), which would have allowed for individual liability. See *Lavarias*, 2006 U.S. Dist. LEXIS 86005, 2006 WL 3422256 at *2. The *Lavarias* decision expressly recognized that Judge Seabright and Judge King had reached the opposite result, but said that Judge Ezra was "in agreement with Judge Mollway." *Lavarias* acknowledged that, two years earlier, in his White ruling, Judge Ezra had similarly "concurred with Judge Mollway in the *Luzon v. Atlas* case, finding that Haw. Rev. Stat. Chap. 378 does not impose individual liability (other than in section 378-2(3), which has a provision for aiding and abetting)." *Id.* n.2.

In December 2006, Judge Kay agreed with Judge Seabright's *Sherez* decision. See *Hale*, 468 F. Supp. 2d at 1227-28. Judge Kay was "persuaded by the broader and more direct reading of the statute that includes individual agents without employees as employers." *Id.* at 1227. Judge Kay analyzed the legislative history of chapter 378, noting that it contained "no indication that the Hawaii legislature ever intended to exclude individual agents from the definition of the term 'employer.'" *Id.* at 1228. Specifically, Judge Kay held:

> It is also useful to examine the legislative history of the definition of "employer." The term "employer" was originally defined by Act 44 of the 1964 Hawaii Session Laws, 1964 Haw. Sess.

Laws 44 § 2A ("Act 44"), as "any person having one or more persons in his employment, and includes any person acting as an agent of an employer, directly or indirectly." It is clear from the original definition that the phrase "having one or more persons" does not modify or limit the term "agent." Rather, the term "employer" expansively includes "any person" that is an agent. When the definition was amended to its current form in 1981, both the House and Senate Standing Committee Reports explained that the purpose of the amendment was solely to extend liability to state and county governments. There is no mention of an intent to suddenly immunize individual agents from liability. See Comm. Rep. No. 549, Reg. Sess. (House Journal 1981); Comm. Rep. No. 653, Reg. Sess. (Senate Journal 1981). After combing through the entire legislative history of this statute, the Court finds no indication that the Hawaii legislature ever intended to exclude individual agents from the definition of the term "employer."

Furthermore, a pertinent Hawaii state ruling supports the conclusion that an individual without employees may be liable as an agent of his employer pursuant to Section 378(2). In *Steinberg v. Hoshijo*, the Hawaii Supreme Court upheld the HCRC's finding that a doctor sexually harassed a medical assistant in violation of H.R.S. 378-2(1)(A). 88 Haw. 10, 17-19, 960 P.2d 1218 (1998). Significantly, the charge was not pursued under the aid and abet provision. The court appears to assume, as did the parties, that the defendant doctor was "an agent of the Clinic

> and therefore an 'employer' as defined by HRS § 378-1." *Id.* at 18 n.10, 960 P.2d 1218. As noted previously by this Court and Judge King, this conclusion comports with other HCRC findings that have held individual employees jointly and severally liable for damages arising out of harassment. *Harrell*, Civ. No. 99-00924 ACK at 22; Black, 112 F. Supp. 2d at 1056-57 (citing *Tseu v. Cederquist, Inc.*, No. 95-001-E-R-S (HCRC June 28, 1996); *Santos v. Niimi*, No. 92-001-E-SH (HCRC Jan. 25, 1993)).

Hale, 468 F. Supp. 2d at 1228. Judge Kay recently reiterated this holding in *United States ex rel. Lockyer*, 490 F. Supp. 2d at 1087, when he determined that there is individual liability under the Hawaii Whistleblower's Protection Act, Haw. Rev. Stat. § 378-62, under what he called the "nearly identical" definition of "employer" in section 378-61.

This court remains unconvinced that Gonsalves may be held individually liable under section 378-2(1) and section 378-2(2). Nothing in the definition of "employer" in section 378-1 or its legislative history indicates that the term "employer" was intended to include individuals who do not employ others. To be an "employer" as defined in section 378-1, an "agent" must have "one or more employees." *See Maizner*, 405 F. Supp. 2d 1225 at 1235-37.

The legislative history of section 378-2 does not countermand the statutory definition. As Judge Kay notes in *Hale*, "employer" was originally defined as "any person having one or more persons in his employment, and includes any person acting as an agent of an

employer, directly or indirectly." Judge Kay concluded that this original definition of "employer" supports the proposition that an "employee" may be liable as an "agent" of the employer. *Hale*, 468 F. Supp. 2d at 1228. This judge submits that such a reading would distort the statutory language.

"Having One or More Employees" Restricts the Definition of "Employer."

There are two major problems with that reading. First, it ignores the restrictive nature of the words "having one or more employees." As this judge discussed in *Maizner*, those words are not gratuitously descriptive. Those words set forth a fundamental requirement that cannot be ignored. Those words state what kind of person can qualify as an employer, and no one can be an employer without satisfying that requirement. An employer is not any person. An employer is only a person with employees.

"Including" and "Includes" Do Not Introduce Alternatives.

Second, reading "employer" to cover an individual employee who himself employs no one requires construing the word "including" in the present version of the statute (or the word "includes" in the original version of the statute) as providing not for something contained in the category of a person having one or more employees, but instead as providing for something entirely outside of that category. Indeed, that reading provides that what is "included" be the very opposite of the category in which it is purportedly included! The original version of the statute, which

influenced Judge Kay, stated that an "employer" was "any person having one or more persons in his employment, and includes any person acting as an agent of an employer, directly or indirectly." Only by reading "and includes" to mean "or in the alternative" can one obtain a definition that covers as an "employer" both "any person having one or more persons in his employment" and "any person acting as an agent of an employer" without regard to whether that "agent" has one or more employees. This judge, by contrast, reads the definition of "employer" to "include" only an agent who falls within the category of "any person having one or more persons in his employment."

It is perhaps easier to see the problem with reading "includes" to mean "or in the alternative" if we use a very simple, everyday example that is grammatically analogous to the original version of the statutory definition. Suppose the word "boy" were plugged into the grammatical construction used in the original version of section 378-1, which defined "employer." That original version stated that an "employer" was "any person having one or more persons in his employment, and includes any person acting as an agent of an employer." If an analogous grammatical construction were used to define "boy," one might say that a "boy" was "any male having an age of 18 years or less, and includes any person acting as the father of a boy." In this judge's reading of the definition, only a "father" having "an age of 18 years or less" could qualify as a "boy." Thus, an 18-year-old father with an infant son would fit the definition of "boy." But if "includes" is read to mean "or in the alternative," then a 50-year-old father of a 15-year-old boy is "included" in the definition of "boy." That is because, under such a reading of

"includes," the "father" need not also be a member of the category of "any male having an age of 18 years or less."

To take the example one step further, we could define "boy" to mean "any male being 18 years or less in age, and includes any person acting as the parent of a boy." By this judge's reasoning, any "parent" would have to be a "male having an age of 18 years or less." But if "includes" means "or in the alternative," then a parent who was a mother of a boy could herself qualify as a "boy." Just as any "father" or "parent" who is "included" in the definition of "boy" must be a male 18 years or younger, any "agent" included in the definition of "employer" must have one or more employees. This judge submits that the Hawaii legislature cannot have intended to transmute the little word "includes" so that it provided for something as nonsensical as the very opposite of the category in which an "agent" is included.

In *Maizner*, this judge noted that the word "including" in the present version of the statute introduces not only an "agent" of an employer but also the State and the State's political subdivisions as examples of "any person having one or more employees." This judge said,

> It makes no sense to treat "including" as introducing examples of "any person having one or more employees" with respect to "the State or any of its political subdivisions," but then to treat "including" as introducing an example of something in addition to "any person having one or more employees" with respect to "any agent of such person."

405 F. Supp. 2d at 1235. This judge adds here that treating "includes" or "including" as introducing something additional or an alternative would also run counter to the use of those words in other definitions contained in section 378-1, which defines "employer."

Section 378-1, for instance, uses "include" and "includes" to introduce examples, not additions or alternatives, in the definitions of "because of sex" and "being regarded as having such an impairment." Thus, those terms are defined as follows:

> "Because of sex" shall **include,** but is not limited to, because of pregnancy, childbirth, or related medical conditions, and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, **including** receipt of benefits under fringe benefit programs, as other individuals not so affected but similar in their ability or inability to work.
>
> "Being regarded as having such an impairment" **includes** but is not limited to employer consideration of an individual's genetic information, **including** genetic information of any family member of an individual, or the individual's refusal to submit to a genetic test as a condition of initial or continued employment.

Haw. Rev. Stat. § 378-1 (emphasis added).

Similarly, section 378-1 uses "includes" to introduce examples, not additions or alternatives, in the definition of "person," which means "one or more individuals, and

includes, but is not limited to, partnerships, associations, or corporations, legal representatives, trustees, trustees in bankruptcy, receivers, or the State of any of its political subdivisions." Haw. Rev. Stat. § 378-1 (emphasis added). Reading "including" in the definition of "employer" as introducing additions or alternatives thus would run counter not only to the ordinary meaning of "includes" and to the way it is used with respect to the part of the definition of "employer" that refers to "the State or any of its political subdivisions," it would also run counter to the way the terms "includes" and "including" are used in other definitions in section 378-1. This court sees no reason to give the word "including" an idiosyncratic meaning with respect to the definition of "employer" that would be totally at odds with the ordinary meaning given to that term over and over in other parts of section 378-1.

Moreover, construing "includes" and "including" in the normal sense as requiring any "agent" to also have employees would be entirely consistent with the Ninth Circuit's construction of "agent" in Title VII's analogous definition of "employer." Title VII defines "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." 42 U.S.C. § 2000e(b). The Ninth Circuit has determined that an individual cannot be liable for a Title VII violation. See, e.g., *Miller*, 991 F.2d at 587-88.

The court notes further that, even while relying on the Hawaii Supreme Court's decision in *Steinberg*, Judge Kay acknowledges that "[p]resently, no state law precedent speaks directly to the issue of whether an

individual may be liable under sections 378-2(1) or 378-2(2)." *Hale*, 468 F. Supp. 2d at 1227. Although this judge has read her colleagues' analyses of the issue with intense interest and finds them helpful, she is so far not persuaded to change her mind. Her view remains that any "agent" sued under section 378-2 as an "employer" must itself have one or more employees. Thus, Company A might employ a plaintiff who was trained or supervised by Company B, which was, in turn, retained by Company A to train or supervise employees. The plaintiff, upon establishing that Company B acted as Company A's agent, could sue Company B but could not bring a claim under section 378-2(1) or section 378-2(2) against an individual employed by either Company A or Company B. Similarly, Company C might hire an employment agency, Company D, to provide Company C with temporary workers. If Company D refused to send women to work at Company C, Company D might be liable under section 378-2(1).

"Agent" Is Not Defined by Statute.

There is yet another problem with permitting liability against an individual agent with no employees. That additional problem is a practical, rather than grammatical, one. Reading section 378-2(1) or section 378-2(2) as permitting claims against individuals will require the court to, in effect, legislate. Chapter 378 does not define "agent." This judge posits that the reason there is no such definition is that "agent" was intended only as an example of an "employer," not as a separate category. Had it been a separate category distinct from "any person having one or more

employees," then the legislature presumably would have defined it.

A court defining "agent" will have no statutory guidance in deciding which individual qualifies as an "agent" who can be individually sued under section 378-2. Is an agent only someone with supervisory power over a claimant? Must an agent hold a high enough position with an employer that the agent could be said to bind the employer? A court making such decisions would, in essence, be legislating.

In determining that an individual is liable under section 378-2(1) or section 378-2(2), a court would be determining that the law places the burden of litigation on individuals. Imagine a supervisor who decides to hire a woman over a man because the supervisor thought that the woman had a better interview and would fit into the workplace better than the man even if the man had a slightly better resume. The supervisor, despite having based the hiring decision on legitimate criteria, might be sued by the unsuccessful male candidate for gender discrimination. A company might or might not pay for an attorney to defend the supervisor from claims under section 378-2(1). Not all companies are obligated to provide a defense. Holding that individuals may be liable under sections 378-2(1) and 378-2(2) not only subjects actual discriminators to liability, it could also subject wholly innocent individuals to the burdens of litigation. It is not at all clear to this court that Hawaii's legislature decided to impose such a burden on individuals.

This court notes that Judges Kay, Seabright, and King issued their rulings favoring individual liability in cases

involving employers in supervisory positions. See *United States ex rel. Lockyer*, 490 F. Supp. 2d at 1088 (individual defendant was the plaintiff's supervisor); *Hale*, 468 F. Supp. 2d at 1215 (individual defendant was the plaintiff's supervisor); *Sherez*, 396 F. Supp. 2d at 1148 (individual defendant allegedly established a discriminatory policy at a Hawaii public high school); *Black*, 112 F. Supp. 2d at 1056-57 (individual defendant was Michael Nakamura, the former Chief of Police). [3] Under their reasoning, an office manager of a law firm might be an agent of the law firm who could be individually liable for taking an adverse employment action based on some impermissible reason such as a person's race.

But not all employment discrimination claims cognizable under section 378-2 involve adverse employment action claims. Individuals far down in an employer's hierarchy may create a hostile work environment, which is equally actionable under section 378-2. Suppose a long-time mailroom employee at a large company made inappropriate sexual comments to a newly hired female executive. Would the mailroom employee fit a judicially created definition of "agent" such that the individual could be sued under section 378-2(1) or section 378-2(2)? Would the mail clerk's liability contrast with that of an executive at the company who took no adverse employment action but made exactly the same sexual comments to the new hire? In other words, defining "agent" could conceivably lead to a situation in which only certain individuals would be liable under section 378-2(1) or section 378-2(2) for the same conduct, and the distinction would depend not on statutory differences, but on judicial interpolations providing a definition of "agent."

In a two-person company with one person acting as the president and sole shareholder and the other person as an assistant, it might be fairly easy to say that the president and sole shareholder is also an agent of the company. However, in a large bank, it might be difficult to determine if an assistant manager of accounts was an agent of the bank for all purposes. Although the assistant manager would be authorized by the bank to make decisions relating to accounts, that manager might have no authorization to make decisions relating to loans or to employment terms. Without a statutory definition of "agent," a court would be left to guess what the legislature intended by that term. If "agent" was defined as a person authorized to act on behalf of a company, it might lead to situations in which the assistant bank manager described above could be individually liable for suspending a teller based on race but that same manager might not be individually liable for creating a hostile work environment by using racial slurs in referring to the same teller. On the one hand, the bank manager might be said to be acting on the bank's behalf in suspending the teller, but might not be said to be acting on the bank's behalf in using the racial slurs.

Even in the hypothetical two-person company, an agent is not necessarily the boss of the company. Suppose a boss wanted to hire a replacement for a retiring secretary and left it to the secretary to interview and select the replacement. The secretary would arguably be the "agent" of the company and might be sued for alleged discrimination in hiring.

The matter of agency is further complicated if a plaintiff sues a peer. A senior vice president of a large

company might sue another senior vice president, for instance. There is no power imbalance, but the defendant might nevertheless be accused of having created a hostile work environment without any superior's knowledge. Is the senior vice president an "agent"? A court should not be the entity determining what the term "agent" in section 378-1 means.

The matter is particularly complicated in the present case. Gonsalves, a police commissioner, was in the minority at the commission in complaining about Lum. Can an employee who is dissenting be an agent of an employer just by virtue of the employee's job? Thus, for example, one could imagine a case in which the head of a city department fired an employee on the mayor's direction. Would that department head risk liability as an "agent" of the city solely because the person was a department head and without regard for the person's private views? What, if any, defenses might be available under the law to such a person, and who would fashion such defenses?

The above questions pose practical problems if courts take on the task of defining an "agent" for purposes of section 378-2. In ruling that "agent" as used in section 378-1 does not make people individually liable for violations of section 378-2(1) or section 378-2(2), this court, far from being motivated by a bias toward or against any party or category, is deciding that the legislature did not intend for a court to add a definition. In section 378-1, the legislature defined a host of terms. It did not define "agent" because that term was only an illustration, not a free-standing category. Had the legislature intended that individuals be liable under

section 378-2(1) or section 378-2(2), it could have easily said so by defining "agent" in section 378-1. [4]

Sam Teague, Ltd. v. Haw. Civil Rights Comm'n, 89 Haw. 269, 971 P.2d 1104 (1999), cited by Lum at the hearing on the present motion, is not authority for the proposition that individuals are liable as "agents" of the employer. This judge discussed this case in *Maizner*, 405 F. Supp. 2d at 1234 n.3. In *Sam Teague*, the Hawaii Supreme Court recognized that the Hawaii Civil Rights Commission had allowed a claim against the president and sole shareholder of a two person company on the ground that the individual was acting as an agent of a person having one or more employees. However, the Hawaii Supreme Court did not state that such a claim was cognizable. The issue before the court had to do with whether the claim had been timely asserted, and the court appears to have accepted the Hawaii Civil Rights Commission's position as to individual liability for purposes of deciding the limitation issue. It is not at all clear that the cognizability of a claim against an individual was even raised before either the Hawaii Civil Rights Commission or the Hawaii Supreme Court, and the Hawaii Supreme Court was certainly under no obligation to itself raise and decide the issue.

Gonsalves is not individually liable for creating a hostile work environment in violation of section 378-2(1)(A). First, as discussed above, this court rules that there is no individual liability under that section. Second, even if there were such individual liability, Lum does not meet his burden of showing that Gonsalves was acting as an agent of Lum's employer when Gonsalves took his allegedly discriminatory actions.

There is no evidence that Gonsalves employed anyone. Gonsalves was a member of the police commission that selected Lum as the Chief of Police. See, e.g., Ex. FF (Letter from Victor Punua to K.C. Lum) (informing Lum that the commission would select the next Chief of Police on a certain date). Nor is there evidence that Gonsalves acted as anyone's agent in using the term "Hop Sing" or in taking any other action relating to the voiding of Lum's contract. Lum does not dispute that Gonsalves played no role in the actual decision to remove him or in Lum's decision to resign. See Gonsalves's Concise Statement (Aug. 1, 2007) ¶ 29 (asserting that Gonsalves played no role in the Kauai County's decision to remove Lum or Lum's decision to resign); Lum's Concise Statement ¶ 29 (disputing only who decided to remove Lum—Tresler, rather than the County of Kauai—and stating that Lum resigned because there was no lieutenant's position); Local Rule 56.1(g) ("For purposes of a motion for summary judgment, material facts set forth in the moving party's concise statement will be deemed admitted unless controverted by a separate concise statement of the opposing party."). Finally, as discussed in the section below on § 1981 liability, Lum fails to raise a genuine issue of fact as to whether there was a hostile work environment at all.

b. Lum Fails to Allege a Viable Claim that He Was Retaliated Against in Violation of Section 378-2(2).

Paragraph 55 of the Fourth Amended Complaint alleges unlawful retaliation. To the extent the First Cause of Action asserts such retaliation in violation of section 378-2(2) of the Hawaii Revised Statutes, it fails to allege a viable claim. Section 378-2(2) makes it

unlawful for "any employer . . . to discharge, expel, or otherwise discriminate against any individual because that individual has opposed any practice forbidden by this part or has filed a complaint, testified, or assisted in any proceeding respecting the discriminatory practices prohibited under this part."

As discussed above, there is no individual liability for violations of section 378-2(2). [6] Moreover, the alleged retaliation appears to be related, at least in part, to displeasure with Lum's handling of other officers' misconduct in the Fanta-See Express incident, discussed in more detail by this court in an earlier order. See Fourth Amended Complaint ¶ 20. Such alleged retaliation would not be actionable under section 378-2(2), as Lum conceded at the hearing that the Fanta See Express incident was unrelated to discriminatory practices forbidden under chapter 378 of the Hawaii Revised Statutes.

Lum appears to be asserting that he was retaliated against because he filed a complaint with the HCRC on April 7, 2005, complaining about the "Hop Sing" email sent by Gonsalves. See Fourth Amended Complaint ¶ 32. However, Lum fails to show that Gonsalves retaliated against him at all. Paragraphs 47 to 49 of the Fourth Amended Complaint allege that, based on a hearing officer's decision, the County of Kauai Board of Ethics advised the Kauai County Council to cancel Lum's contract; that the Kauai County Council accepted and ratified the County of Kauai Board of Ethic's recommendation, forwarding its decision to the Kauai County's Director of Finance, Michael H. Tresler; and that Tresler cancelled Lum's employment contract because it was voidable. At most, the Fourth Amended

Complaint alleges that the Kauai County Council acted based on "the personal relationship Gonsalves has with several members of the Kauai County Council." Fourth Amended Complaint ¶ 51. A "personal relationship" with members of the Kauai County Council is insufficient to make Gonsalves an "employer" individually liable under section 378-2(2), especially when, as discussed above, Lum does not dispute that Gonsalves played no role in the decision to remove him.

Lum tries to bolster his retaliation claim by pointing to two complaints Gonsalves filed concerning Lum, one with the County of Kauai Board of Ethics and one with the State of Hawaii's Office of the Attorney General. See Exs. GG and HH. Even assuming that Gonsalves was acting in his capacity as a police commissioner when he filed those complaints, Lum fails to show that the filing of the complaints involved actionable retaliation. As noted above, the record does not demonstrate that Gonsalves was Lum's employer such that he could be liable under section 378-2(2). On an even more fundamental level, however, Lum fails to allege actionable retaliation. In *Schefke*, 96 Haw. at 426, 32 P.3d at 70, the Hawaii Supreme Court made it clear that an actionable retaliation claim under section 378-2(2) requires an adverse employment action.

Gonsalves's complaints are not adverse employment actions actionable under section 378-2(2). See *Burlington Indus. v. Ellerth*, 524 U.S. 742, 761, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998) (noting in the Title VII context that a "tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a

decision causing a significant change in benefits"); accord *Shoppe v. Gucci Am., Inc.*, 94 Haw. 368, 378, 14 P.3d 1049, 1059 (2000) (noting that an adverse employment action would include a discharge). A complaint does not change employment status. Even if a ruling on a complaint ultimately constitutes an adverse employment action, it is the ruling, not the complaint, that so qualifies. There is no evidence indicating that Gonsalves issued any ruling adverse to Lum. Gonsalves's October 2005 request for sanctions against Lum, see Ex. K, similarly fails to qualify as an adverse employment, action for purposes of section 378-2(2), as nothing adverse resulted. Accordingly, Lum's section 378-2(2) claims fail. [6]

c. Lum Fails to Allege a Viable Claim Under Section 378-2(3).

To the extent Lum claims a violation of section 378-2(3) of the Hawaii Revised Statutes, that claim fails. Section 378-2(3) allows claims against individuals who are not employers if the individuals "aid, abet, incite, compel, or coerce" discrimination. Haw. Rev. Stat. § 378-2(3). Lum does not clearly alleged facts describing how Gonsalves aided, abetted, incited, compelled, or coerced discrimination. At the hearing on Gonsalves's motion, Lum stated that page 85 of Miles Tanabe's August 2, 2007, deposition, Ex. O, was evidence that Lum aided or abetted Miles Tanabe. However, that deposition excerpt merely indicates that Tanabe spoke to Gonsalves "about Chief Lum during his tenure as the interim chief." *Id.* Lum provides no evidence indicating that this conversation pertained to any discriminatory conduct.

While this court draws all reasonable inferences in Lum's favor on this motion, such inferences must be grounded in the evidence with which Lum proposes to meet his burden of proof. There is absolutely no evidence that any communication by Gonsalves led anyone else to even complain about Lum, much less make a negative employment decision. Certainly there is no evidence that Lum aided, abetted, incited, compelled, or coerced anyone else to discriminate. For all the court knows, Gonsalves and Tanabe may have discussed only Lum's attendance record or report-writing ability. On this motion, it was incumbent on Lum to make some showing of how he will meet his burden of establishing that Gonsalves aided, abetted, incited, compelled, or coerced others in prohibited discrimination. This court had no duty to search the voluminous record submitted by Lum without corresponding pinpoint citations in either his opposition or his Concise Statement. See Local Rule 56.1(f).

3. 42 U.S.C. § 1981.

The Fourth Amended Complaint's First and Second Causes of Action also assert that Gonsalves violated 42 U.S.C. § 1981, which states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a).

While not liable under Title VII, "individuals may be held liable under §§ 1981 and 1983 for certain types of discriminatory acts, including those giving rise to a hostile work environment." *Patterson v. County of Oneida*, 375 F.3d 206, 226 (2d Cir. 2004). Lum is arguing that Gonsalves violated § 1981 by calling Lum "Hop Sing" in an October 2004 email. See Ex. G to Gonsalves's motion. [7] Gonsalves moves for summary judgment, arguing that this isolated comment did not create a hostile work environment. This court agrees.

Lum's hostile work environment claim requires his workplace to have been permeated with discriminatory intimidation, ridicule, and/or insult sufficiently severe or pervasive to alter the conditions of Lum's employment and create an abusive or hostile working environment. See *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 78, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998); *El Hakem v. BJY Inc.*, 415 F.3d 1068, 1073 (9th Cir. 2005) (noting that the same standard applies to both § 1981 and Title VII claims), cert. denied, 547 U.S. 1004, 126 S. Ct. 1470, 164 L. Ed. 2d 248 (2006). The objective severity "should be judged from the perspective of a reasonable person in the plaintiff's position." *Oncale*, 523 U.S. at 81. Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment. *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 121 S. Ct. 1508, 1510, 149 L. Ed. 2d 509 (2001).

> Workplace conduct is not measured in isolation; instead, whether an environment is sufficiently

> hostile or abusive must be judged by looking at all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

Id. (internal quotations omitted) (noting that an isolated incident involving a statement that "making love to you is like making love to the Grand Canyon" was insufficient to violate Title VII).

The single email sent by Gonsalves to someone other than Lum, even if Lum later learned that the email referred to Lum as "Hop Sing," is insufficient to have caused Lum's workplace to have been permeated with discriminatory intimidation, ridicule, and/or insult sufficiently severe or pervasive to alter the conditions of Lum's employment and create an abusive or hostile working environment. See *Oncale*, 523 U.S. at 78. None of the cases cited by Lum indicates that a single stray remark can form the basis of a viable hostile work environment claim. Lum himself "does not contend that the term 'Hop Sing' by itself constitutes a hostile work environment." See Opposition (Oct. 4, 2007) at 27. Instead, Lum says that "it constitutes evidence of a racial bias by Gonsalves against him." See Opposition (Oct. 4, 2007) at 27. However, a racial bias is not itself actionable under § 1981.

Lum seeks to bolster his § 1981 claim by saying that Gonsalves not only sent the "Hop Sing" email but also retaliated against him based on his race by filing complaints against him. But the complaints filed by

Gonsalves were not "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." See *Burlington*, 126 S. Ct. at 2409.

There is no dispute that, after Lum complained to the Mayor of Kauai about the "Hop Sing" email, Gonsalves filed a complaint with the County of Kauai Board of Ethics and a complaint with the State of Hawaii Attorney General's office. The complaints alleged that the selection process for the Chief of Police was irregular, as other members of the police commission had predetermined that Lum would be chosen. Gonsalves also complained that information regarding Lum's handling of the Fanta-See Express incident--information that, while not suggesting illegal activity by Lum, arguably reflected on his administrative ability--was omitted from an information packet for the meeting at which Lum was selected as Chief of Police. See Exs. GG and HH. Both complaints accuse other police commissioners of possible improprieties. While Lum is the subject of the alleged improprieties, he himself is not accused of having acted improperly in the selection process. As Gonsalves's complaints were neither aimed at Lum nor even related to race discrimination, the complaints could not be said to have been capable of dissuading a reasonable employee from making or supporting a charge of discrimination. Lum simply does not show that the complaints, even combined with the "Hop Sing" email, are actionable under § 1981. To hold otherwise would require a court to infer that every negative remark was illegally discriminatory. Such an inference would silence even legitimate criticism.

B. The Third Claim for Relief (§ 1985).

Lum also asserts that Gonsalves violated 42 U.S.C. § 1985 by conspiring to deprive him of rights because of Lum's race. See Fourth Amended Complaint, Third Claim for Relief (May 8, 2007). Lum's Complaint does not identify which subsections of § 1985 he is claiming Gonsalves violated. At the hearing, Lum clarified that he is asserting the same violations of § 1985 by Gonsalves as he asserted by Tresler in an earlier motion. Lum is therefore asserting violations of the second clause of § 1985(2) and the first and second clauses of § 1985(3).

The second clause of § 1985(2) provides for a claim if:

> two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws.

The first clause of § 1985(3) prohibits private conspiracies to deny equal protection of the laws.

The second clause of § 1985(3) prohibits conspiracies "for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws." As this court ruled earlier with respect to Tresler's motion, the

second clause of § 1985(3) is simply inapplicable to the present case, as the record does not indicate that anyone prevented or hindered "the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws."

Gonsalves has moved for summary judgment on Lum's § 1985 claims, arguing that Lum has failed to present any evidence demonstrating the existence of a conspiracy, any actionable conduct, and any acts in furtherance of the conspiracy. This court agrees. Even drawing all inferences in Lum's favor, this court finds no evidence from which it could possibly infer that there was a "meeting of the minds" between Gonsalves and somebody else to discriminate against Lum because of Lum's race. See, e.g., *Caldeira v. County of Kauai*, 866 F.2d 1175, 1181 (9th Cir. 1989) ("to prove a section 1985 conspiracy between a private party and the government under section 1983, the plaintiff must show an agreement or 'meeting of the minds' by the defendants to violate his constitutional rights"). In other words, Lum has failed to raise a genuine issue of fact as to whether the "purpose of the conspiracy was to deprive the plaintiff of equal protection, equal privileges and immunities, or to obstruct the course of justice in the state." *Sykes v. State of California (Dep't of Motor Vehicles)*, 497 F.2d 197, 200 (9th Cir. 1974).

At most, Lum has introduced evidence from which it might be inferred that Gonsalves was racially motivated in seeking to have Lum terminated as the Chief of Police. Lum has introduced evidence indicating that Tanabe and Scott Yagihara also wanted to have Lum terminated as the Chief of Police, and that

Gonsalves and Tanabe "spoke" about Lum. Even drawing all inferences in Lum's favor, this evidence is insufficient to raise a genuine issue of fact as to whether Gonsalves and Tanabe and/or Yagihara conspired to have Lum terminated because of Lum's race There is no evidence of racial animus by Tanabe or Yagihara, who may have wanted Lum fired for reasons totally unrelated to any prohibited basis. Lum fails to introduce any evidence as to whether there was a "meeting of the minds" between or among these individuals to violate Lum's civil rights. Accordingly, Lum's claims under the second clause of § 1985(2) and the first clause of § 1985(3) fail. [8]

C. The Fifth Claim for Relief.

The Fifth Claim for Relief asserts a violation of the Hawaii Whistleblowers' Protection Act, section 378-62 of the Hawaii Revised Statutes. Although the Fourth Amended Complaint does not clearly articulate the subsection of the statute supposedly violated or the factual basis for the claim, page 37 of Lum's opposition clarifies that he is alleging a violation of section 378-62(1)(A), which states:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because:
>
> (1) The employee, or a person acting on behalf of the employee, reports or is about to report to the employer, or reports or is about to report to a

> public body, verbally or in writing, a violation or a suspected violation of:
>
> (A) A law, rule, ordinance, or regulation, adopted pursuant to law of this State, a political subdivision of this State, or the United States[.]

Page 37 of Lum's Opposition further clarifies:

> Lum contends that Gonsalves' retaliatory bias against Lum began from his blaming him for what happened to the five officers in the FantaSee Express case which he openly expressed during the application process. Moreover, Gonsalves efforts to sanction and remove Lum for supposed poor performance as discussed above supports Lum's claim that he was subject[ed] to reprisal by Gonsalves in violation of [section 378-62].

Lum's section 378-62 claim fails for several reasons. First, Lum fails to show that Gonsalves is an "employer" who can be liable under that section. Section 378-61 defines "employer" as "a person who has one or more employees. Employer includes an agent of an employer or of the State or a political subdivision of the State." As explained earlier in this order in connection with sections 378-2(1) and 378-2(2), this court does not read a provision that "includes" an agent as an "employer" with "one or more employees" as somehow giving rise to liability on the part of an individual employing no one. For the same reasons that section 378-2(1) and section 378-2(2) do not impose individual liability, this court rules that section 378-62 does not impose individual liability. [9] In this regard, this judge's

interpretation of whether an individual can be an "employer" for purposes of section 378-61 differs from that of Judges Ezra and Kay.

Judge Ezra only a few days ago addressed this very issue in an amended order in *Black v. Correa*, Civ. No. 07-00299 DAE/LEK, 2007 U.S. Dist. LEXIS 69861, 2007 WL 3195122 (D. Haw. Oct. 30, 2007). Judge Ezra ruled that an individual can be liable under section 378-62 as an agent of an employer. *Id.* 2007 U.S. Dist. LEXIS 69861, [WL] at *18 to *20. Judge Ezra noted that his determination of individual liability under section 378-62 "might appear inconsistent with [his] reasoning in *Lavarias* and *White*," in which he held there was no individual liability under section 378-2(1) or section 378-2(2). *Id.* 2007 U.S. Dist. LEXIS 69861, [WL] at *19. He nevertheless distinguished his earlier rulings based on the definitions of "employer," which he determined was broader under section 378-61, which governs the claim under section 378-62, than under 378-1, which governs claims under section 378-2.

Under section 378-61, "employer" is defined as "a person who has one or more employees. Employer includes an agent of an employer or of the State or a political subdivision of the State." Because the legislature chose to define "employer" in section 378-61 in two separate sentences, rather than in a single sentence as in section 378-1, Judge Ezra reasoned that the definition suggests an "'either/or' scenario." *Black*, 2007 U.S. Dist. LEXIS 69861, 2007 WL 3195122, *19. That is, Judge Ezra views section 378-61 as imposing liability on either persons with one or more employees, or on agents of an employer. *Id.*

This judge returns to her definition of "boy" to illustrate the problem with this reading. Suppose, using the grammatical construction used in section 378-61 to define "employer," "boy" were defined as: "a male who is 18 years old or less. Boy includes a father of a boy." Under Judge Ezra's "either/or" construction of that definition, the boy could be either "a male who is 18 years old or less." or "a father of a boy." Under that "either/or" construction, a 50-year-old father of a 15-year-old male would meet the definition of "boy."

This court submits that the legislature's use of two sentences, rather than one, does not indicate an intent to impose individual liability. Rather, the second sentence—"Employer includes an agent of an employer"—merely provides an example of what is included in the definition of employer, which is a person with one or more employees.

This court agrees with Judge Kay that the definitions of employer found in sections 378-1 and 378-62 are "nearly identical." *See United States ex rel. Lockyer*, 490 F. Supp. 2d at 1088. This judge does not see the differences in syntax between the definition of "employer" in section 378-1 and the definition of "employer" in section 378-61 as signaling opposing legislative intents. Although this judge and Judge Kay reach different conclusions, this judge and Judge Kay read section 378-1 as consistent with section 378-61. For the same reasons that this judge rejects individual liability under section 378-2, this court rules that there is no individual liability under section 378-62.

This judge recognizes that the restrictive nature of the requirement of employees may not be as clear from a

grammatical standpoint in section 378-61 as it is in section 378-1. But the difference in clarity is a matter only of degree and does not negate the need for contortions if one is to read individuals as included in the definition of "employer" in section 378-61. To find individuals covered under that definition, one must move the word "includes" and add the words "either" and "or," so that the definition provides that an "employer" includes "either" a person with employees "or" an agent. This is an unwarranted rewriting of the definition that leads to the situation in which a person fits within both the definition of "employer" in section 378-61 and the definition of "employee" in section 378-61 for taking the exact same acts. Under Judge Ezra's reasoning in *Black*, Chief Correa is both Sharon Black's employer and himself an employee. This court posits that the legislature did not intend such a result.

Nothing in the legislative history of section 378-62 and of section 378-61 evidences any intent that the definition of "employer" in section 378-61 be read more broadly than the definition in section 378-1. Breaking the definition of employer into two sentences does not, by itself, evidence any such intent. Such an intent appears particularly unlikely because the definitions are intended to apply to what, in some instances, may be duplicative claims under section 378-2(2) and section 378-62. In Judge Ezra's *Black* case, for example, the plaintiff asserted that she was retaliated against "for exercising her rights to testify in a court of law from past sexual harassment." *Black*, 2007 U.S. Dist. LEXIS 69861, 2007 WL 2195122, *16. That conduct could be said to violate both section 378-2(2) (prohibiting employers from discriminating "against any individual because the individual has opposed any practice

forbidden by this part or has filed a complaint, testified, or assisted in any proceeding respecting the discriminatory practices prohibited under this part") and section 378-62 (prohibiting employers from discriminating against an employee because the employee "reports or is about to report to the employer, or reports or is about to report to a public body, verbally or in writing, a violation or a suspected violation of . . . (A) A law, rule, ordinance, or regulation, adopted pursuant to law of this State, a political subdivision of this State, or the United States"). Under the reasoning in *Black*, Chief Correa thus might be sued as an individual under section 378-62 for the very same conduct he could not be individually liable for under section 378-2(2). It makes little sense to treat claims under section 378-2(2) differently from identical claims under section 378-62 just because the Hawaii legislature chose to break the definition of "employer" into two sentences in section 378-61.

The court notes that, in chapter 378 of the Hawaii Revised Statutes, the Hawaii legislature actually defines "employer" four different ways. See Haw. Rev. Stat. § 378-1 (discriminatory practices) ("'Employer' means any person, including the State or any of its political subdivisions and any agent of such person, having one or more employees, but shall not include the United States."); Haw. Rev. Stat. § 378-62 (lie detector tests) ("'Employer' includes any individual, partnership, association, corporation, business trust, legal representative, receiver, trustee, or successor of any of the same, or any organized group of persons, acting directly or indirectly in the interest of any employer in relation to an employee."); Haw. Rev. Stat. § 378-31 (unlawful suspension or discharge) ("'Employer'

includes any individual, partnership, association, joint-stock company, trust, corporation, the personal representative of the estate of any of the same, employing any persons, but shall not include the State or any political subdivision thereof or the United States."); and Haw. Rev. Stat. § 378-61 ("'Employer' means a person who has one or more employees. Employer includes an agent of an employer or of the State or a political subdivision of the State."). In two of the four definitions of "employer" in chapter 378, the legislature expressly included individuals in the definition. Because the legislature did not clearly indicate an intent to include individuals in the definition of "employer" in section 378-61, this court does not stretch to give that statute such a meaning.

Even if an individual could be liable as an "agent," Lum makes no showing that Gonsalves did act as an agent of Lum's employer. Even if Gonsalves acted as such an agent in his capacity as a police commissioner, Lum identifies no actionable retaliation taken in that capacity.

To the extent Lum asserts that Gonsalves retaliated against him based on Lum's Fanta-See Express complaint, Lum demonstrates no viable section 378-62 claim. Although Gonsalves voted against hiring Lum as interim Chief of Police, Gonsalves was outvoted, and Lum was actually hired. Similarly, although Gonsalves may have actively tried to remove Lum from his position as Chief of Police, Lum does not dispute that Gonsalves played no role in the actual decision to remove him. As this court ruled in a previous order, that decision was based on a legitimate determination that Lum's contract was void. Even assuming, as Lum

contends, that Gonsalves initiated the complaint that ultimately led to Lum's termination by the County of Kauai or Tresler, Lum fails to raise a genuine issue of fact as to whether the termination (as opposed to Lum's complaint) was in retaliation for Lum's having "blown the whistle." Lum simply fails to show that Lum lost his job in retaliation for whistleblowing activity. See *Crosby v. State Dep't of Budget & Fin.*, 76 Haw. 332, 342, 876 P.2d 1300, 1310 (1994) ("a causal connection between the alleged retaliation and the 'whistleblowing' is required"). Accordingly, summary judgment is granted in favor of Gonsalves on Lum's Fifth Claim for Relief.

V. CONCLUSION.

The court grants summary judgment in favor of Gonsalves. No claims remain against Gonsalves. This order leaves for further adjudication the First, Second, Third, and Fifth Claims for relief, to the extent those claims are asserted against Defendants County of Kauai, Kauai County Council, and Bryan Baptiste.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, November 9, 2007.

/s/ Susan Oki Mollway

Susan Oki Mollway
United States District Judge

Footnotes

1 Lum is not arguing that Gonsalves caused him to

suffer a tangible adverse employment action based on race. This court has already determined that Lum's employment contract was void. As discussed below, Lum also does not contest Gonsalves's assertion that Gonsalves played no role in the County of Kauai's or Tresler's decision to declare Lum's contract void.

2 The issue seems an appropriate one to certify to the Hawaii Supreme Court, but no party has moved for certification. Indeed, Lum, in an October 31, 2007, letter to the court, expressly declines to seek certification, presumably in the interest of keeping his trial date.

3 Plaintiff's trial brief in *Sherez* indicates that the individual defendant in that case was the vice principal of the high school. See Plaintiff Robert Sherez's Trial Brief, Civ. No. 04-00390 JMS/KSC (Mar. 13, 2007) at 3 (available as document 175 in the electronic file available on this court's CM/ECF system).

4 This judge is of the view that all of the issues raised with respect to the definition of "employer" in section 378-1 also apply to the definition of "employer" in section 378-61. The definition in section 378-61, the subject of individual liability under section 378-62, Judge Kay's decision in *U.S. ex rel. Lockyer*, and Judge Ezra's decision in *Black* are discussed further in Part IV.C. of this order.

5 On October 30, 2007, Judge Ezra filed an amended order in Black v. Correa, 2007 U.S. Dist. LEXIS 69861, 2007 WL 3195122, *18 (D. Haw. Oct. 30, 2007). In that order, Judge Ezra states that this judge has "conclusively determined that Haw. Rev. Stat. § 378-2(2) does not impose individual liability against those

who discriminate." This judge does not consider her ruling "conclusive," as only the Hawaii Supreme Court can conclusively make such a determination.

6 Lum argues that, in 2006, the Supreme Court abandoned the adverse employment action requirement for retaliation cases. See *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006). Burlinton Northern clarified that the substantive Title VII "adverse employment action" requirement, e.g. a termination, demotion, etc., was not required for Title VII retaliation claims. Instead, "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse," meaning that "it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." 126 S. Ct. at 2415. The Supreme Court provided some examples that might not be "adverse employment actions" for substantive Title VII purposes, but would qualify as sufficient bases for its retaliatory provisions. For example, "[a] schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children." *Id.* at 2415. Also, "[a] supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination." *Id.* at 2415-16. *Burlington Northern* is distinguishable because it pertains to Title VII claims, not claims under section 378 2(2). Although *Schefke* relied on now-overruled Title VII retaliation cases in determining that section

378-2(2) claims require adverse employment actions, *Schefke* is still binding on this court, as the Hawaii Supreme Court was interpreting Hawaii law. Even if the Hawaii Supreme Court were to revisit the issue and determine that an adverse employment action is now unnecessary for claims under section 378-2(2), Gonsalves's claims would fail because, as an individual, he was not Lum's employer.

7 At the hearing, Lum clarified that his race discrimination claims are not based on Gonsalves's earlier alleged use of the name "Hop Sing" for Lum from 1988 to 1989. See Lum Depo. at 123. Lum also does not dispute that his nickname while he was a Kauai Police Department officer was "Hop Sing." See Lum's Counter-Concise Statement of Facts (Oct. 5, 2007) ¶¶ 19-20.

8 Accordingly, the court need not reach the issue of whether Lum's § 1985 claims are barred by the intracorporate immunity doctrine, which states that a corporation cannot conspire with its own employees or agents. See, e.g., *Schmitz v. Mars, Inc.*, 261 F. Supp. 2d 1226, 1234 (D. Or. 2003).

9 This court recognizes that, in *Mock v. Castro*, 2004 Haw. LEXIS 591 (2004), the Hawaii Supreme Court, in a memorandum decision, reversed a directed verdict after a jury trial in favor of an individual defendant on a section 378-62 claim, remanding that claim to the trial court. Under Rule 35(c) of the Hawaii Rules of Appellate Procedure, *Mock* may not be cited and therefore has no precedential value. In any event, the Hawaii Supreme Court did not expressly examine in *Mock* whether an individual can be liable under section

378-62. Nor does this court have any basis for concluding that the trial court actually examined the issue of whether there is individual liability under section 378.2. The parties in *Mock* may not have raised the issue and may have therefore waived it.

Civ. No. 06-00068 SOM/LEK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

KING C. LUM,
Plaintiff,

vs.

KAUAI COUNTY COUNCIL, et al.,
Defendants.

September 25, 2007, Decided
September 25, 2007, Filed

Susan Oki Mollway, United States District Judge.

ORDER GRANTING DEFENDANT MICHAEL H. TRESLER'S MOTION FOR SUMMARY JUDGMENT

I. *INTRODUCTION.*

On May 18, 2007, this court granted summary judgment against Plaintiff King C. Lum on the Fourth Claim for Relief in his Fourth Amended Complaint. On July 31, 2007, Defendant Kauai County Director of Finance Michael H. Tresler moved for summary judgment on the remaining claims asserted against him in the Fourth Amended Complaint. Because Lum fails to raise a genuine issue of fact as to whether Tresler conspired against him because of his race, summary judgment is granted in favor of Tresler on the Third Claim for Relief.

To the extent Lum asserts a § 1981 claim against Tresler, summary judgment is granted in favor of Tresler. Lum waived his § 1981 claims against Tresler. Even if Lum had not waived his § 1981 claims against Tresler, those claims would fail because Lum presents no evidence indicating that Tresler discriminated against Lum because of Lum's race.

Summary judgment is also granted in favor of Tresler on the Fifth Claim for Relief (Hawaii Whistleblowers Protection Act), as Lum has conceded that summary judgment on that claim is appropriate.

II. *LEGAL STANDARD.*

The summary judgment standard was set forth in this court's May 18, 2007, order. That standard is incorporated herein by reference.

III. *BACKGROUND FACTS.*

The factual background was also set forth in this court's May 18, 2007, order. That factual background is incorporated by reference and is supplemented herein as necessary.

IV. *ANALYSIS.*

A. *Because Lum Has No Evidence That Tresler Conspired to Remove Him as Chief of Police Because of His Race, Summary Judgment is Granted In Favor of Tresler on the Third Claim for Relief (§ 1985).*

Lum's Fourth Amended Complaint asserts that Tresler violated 42 U.S.C. § 1985 by conspiring to deprive him

of rights because of Lum's race. *See* Fourth Amended Complaint, Third Claim for Relief (May 8, 2007). Lum claims that the object of the conspiracy was to remove him from the position of Chief of Police for the County of Kauai. *See* Plaintiff's Memorandum in Opposition (Aug. 30, 2007) at 34. Tresler moves for summary judgment, arguing in relevant part that, when he took steps to remove Lum as Chief of Police, he was not motivated by Lum's race. As Lum submits no evidence indicating that Tresler conspired against him because of his race, this court grants summary judgment in favor of Tresler on the Fourth Claim for Relief–Civil Conspiracy.

Section 1985 contains discrete substantive clauses. Lum says that he is asserting violations of the second clause of § 1985(2) and the first and second clauses of § 1985(3).[1] The second clause of § 1985(2) provides a cause of action if:

> two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws.

The first clause of § 1985(3) prohibits private conspiracies to deny equal protection of the laws.

The second clause of § 1985(3) prohibits conspiracies "for the purpose of preventing or hindering the

constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws." This clause is simply inapplicable to the present case. Lum offers no evidence that Tresler's actions prevented or hindered any State of Hawaii authority from giving or securing equal protection to any person in the State of Hawaii. Even assuming that the second clause of § 1985(3) could apply to a conspiracy to terminate a county official, Lum identifies no conspiracy to interfere with a public official's ability to provide equal protection. To the contrary, Lum merely contends that his termination impeded the Maui Police Department's ability to enforce drug laws. Enforcement of drug laws, however, does not, on its own, implicate equal protection. [5]

To the extent Lum's Third Claim for Relief is based on the second clause of § 1985(2) and/or the first clause of § 1985(3), Tresler is also entitled to summary judgment. Both clauses require invidiously discriminatory, racial or class-based animus. *See Bretz v. Kelman*, 773 F.2d 1026, 1028-30 (9th Cir. 1984) (en banc) (holding that racial or class-based discrimination is required for claims under the second clause of § 1985(2) and the first clause of § 1985(3)). "To establish racial or class based animus, a plaintiff must show 'invidiously discriminatory motivation . . . behind the conspirators' action.'" *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987) (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971)).

The only evidence of a race-based animus that Lum presents is an October 14, 2004, email by Leon Gonsalves, Sr., a police commissioner for the Kauai Police Department. In that email, Gonsalves refers to

Lum as "HOP-SING," which Lum says is a derogatory term for a person of Chinese descent. *See* Ex. J attached to Lum's Concise Statement (Aug. 30, 2007). Lum submits no evidence that Tresler conspired with Gonsalves or others to discriminate against Lum based on Lum's race. At most, Tresler's deposition testimony indicates that Tresler thought that the press blew Gonsalves's email out of proportion. *See* Deposition of Michael Tresler (Jan. 30, 2007) at 126. Tresler also testified that he attended a meeting at which the Kauai County Council decided not to remove Gonsalves as a police commissioner. Tresler personally agreed with that decision, noting that Lum had stated that he could continue to work with Gonsalves. *Id.* at 91-93. Nothing in the record indicates that Tresler entered into any agreement that Gonsalves would call Lum "HOP-SING." Nor is there anything in the record relating to a racial bias against Lum by Tresler.

Lum himself alleges that there was a conspiracy totally unrelated to race. He posits a conspiracy to have him terminated in retaliation for his having turned in Tresler's friends for inappropriate behavior. Lum says that, in 1995, he oversaw an undercover operation into the Fanta-See Express exotic dance group. Declaration of King C. Lum (Aug. 28, 2007) ¶ 4. Four women were arrested in connection with that operation, one of whom claimed that officers with the Kauai Police Department inappropriately touched her and took nude photos of her. *Id.* ¶ 5. Lum reported the incident to then-Chief of Police George Freitas. *Id.* ¶ 6. Two officers resigned, and officers Todd Tanaka, Randy Machado, and Melvin Rapozo were fired. *Id.* ¶ 7. Tanaka, Machado, and Rapozo were subsequently reinstated. *Id.* ¶ 8. Tanaka and Rapozo were allegedly Tresler's friends, and

Machado, now deceased, was Tresler's childhood friend. Tresler Depo. at 16, 18-19, and 42. Kapozo is now a Kauai County Councilmember. Lum says that Gonsalves--the person who allegedly sent the "HOP SING" email--was an investigator for the County of Kauai's prosecutor, *see* Lum Decl. ¶ 16, and was aware of the Fanta-See Express incident. *See* Testimony of Leon Gonsalves, Sr. (Nov. 22, 2004) (attached as Ex. CC). None of this, even in Lum's account, relates to Lum's race.

Equally unrelated to race is the evidence of Tresler's alleged concern about Lum's qualifications to be the Chief of Police and Lum's purported lack of budgetary skills. *See* Tresler Depo. at 56-57, 120-121.

Lum's contention that Tresler is responsible for the County of Kauai's failure to preserve evidence pertaining to this case is also unrelated to race. On September 5, 2006, pursuant to the agreement of the parties to this case, this court ordered, "All evidence relevant in this matter will not be destroyed." *See* Order Granting Plaintiff's Motion for an Order to Preserve Evidence (Sept. 5, 2006). Lum says that Tresler participated in the decision to delete all emails older than 90 days from the Kauai County email system. *See* Tresler Depo at 113-16. There is no evidence that Tresler's participation in the decision to delete old emails, including the "HOP SING" email, was related to Lum's race. Lum has a copy of that email, so any deletion of that email did not affect its availability in this case. Lum identifies no other deleted email relating to race.

Lum finally argues that some of Tresler's comments

indicate that he was part of a conspiracy. Richard Stauber says that, during a lunch break at a county council meeting, he and Tresler spoke in the parking lot. *See* Declaration of Richard Otto Stauber (Aug. 24, 2007) ¶¶ 8-9. Stauber says that he had the impression that Tresler disliked Lum "for some reason." *Id.* ¶ 12. When the topic of the council's refusal to remove Gonsalves from his position as a police commissioner came up, Stauber says that Tresler told him that "we had to come up with another plan." *Id.* ¶ 13. Stauber says that Tresler then told him that "we" went to "Ethics" and removed Mike Ching, [3] another police commissioner, and that "Carol Furtado [, another police commissioner,] will be next." *Id.* ¶¶ 15-16. None of these alleged comments, however, indicates that Tresler conspired with others to discriminate against Lum because of Lum's race.

Because Lum has failed to raise a genuine issue of fact as to whether Tresler conspired against Lum because of Lum's race, Tresler is entitled to summary judgment on Lum's § 1985 claim. *See Bretz*, 773 F.2d at 1028-30.

B. *To the Extent the Complaint Asserted a § 1981 Claim Against Tresler, Lum Waived that Claim.*

Lum's Second and Third Claims for Relief assert § 1981 claims. At the hearing, Lum contended that these § 1981 claims included claims against Tresler. However, Lum had already waived those claims. In his deposition, Lum was asked whether he was asserting a § 1981 claim against Tresler. Before answering that question, Lum conferred with his attorney. Lum then stated that he was not asserting a § 1981 claim against Tresler. *See* Deposition of King C. Lum (Jan. 19, 2007) at 583-85.

Lum similarly did not dispute Tresler's Concise Statement, which asserted that "Plaintiff is not asserting . . . the Second Claim For Relief against TRESLER." Tresler's Concise Statement (July 31, 2007) P 2; Lum's Concise Statement (Aug. 30, 2007) P 2. Lum has therefore waived his § 1981 claims against Tresler.

Even if Lum had not waived his § 1981 claims against Tresler, Lum could not succeed on a § 1981 claim against Tresler. [4] A prima facie case under § 1981 is established by proof of facts supporting an inference of intentional discrimination. In *Gay v. Waiters' and Dairy Lunchmen's Union, Local No. 30,* 694 F.2d 531 (9th Cir. 1982), the court said:

> Since a prima facie section 1981 case, like a prima facie disparate treatment case under Title VII, requires proof of intentional discrimination, the focus of the judicial inquiry must be whether the plaintiff has proven by a preponderance of evidence facts from which the court must infer, absent rebuttal, that the defendant was more likely than not motivated by a discriminatory animus. Under both statutes, the court must make a sensitive inquiry into the direct and circumstantial evidence of discrimination offered by the plaintiff in order to determine if the facts so proved allow a legally-permissible inference of discriminatory intent. Accordingly, it is not inappropriate to allow section 1981 claimants to avail themselves of Title VII discriminatory treatment standards in proving a prima facie case.

Id. at 538. The burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), therefore applies to Lum's § 1981 claim. *Turin v. County of Los Angeles*, 123 F.3d 1259, 1264 (9th Cir. 1997) (applying burden-shifting analysis to § 1981 claim), *superseded by statute on other grounds as stated in Leisek v. Brightwood Corp.*, 278 F.3d 895, 899 n.2 (9th Cir. 2001).

Tresler moved for summary judgment "on all remaining claims against TRESLER set forth in the Fourth Amended Complaint." Motion (July 31, 2007) at 1. Lum was therefore on notice that, if he was asserting § 1981 claims against Tresler notwithstanding his earlier waiver of those claims, Tresler was seeking summary judgment on those claims. Lum had ample opportunity at the hearing to address his § 1981 claims. Lum is therefore not prejudiced by this court's consideration of whether Tresler is entitled to summary judgment as to those claims.

Based on the record before the court, it is questionable whether Lum, had he not waived his § 1981 claims, would have carried his initial burden of showing actions taken by Tresler from which one could infer, if such actions remained unexplained, that they were "based on a discriminatory criterion illegal under the Act." *Furnco Constr. Corp v. Waters*, 438 U.S. 567, 577, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978). For purposes of this motion, however, the court assumes that Lum would satisfy his burden, as proving a prima facie case is not onerous. *Sischo-Nownejad v. Merced Cmty. College Dist.*, 934 F.2d 1104, 1111 (9th Cir. 1991) ("evidence may be either direct or circumstantial, and . . . the amount that must be produced in order to create a *prima facie*

case is very little") (internal citations omitted), *abbrogated on other grounds by statute as state in Dominguez-Curry v. Nev. Transp. Dep't.*, 424 F.3d 1027 (9th Cir. 2005). Under *McDonnell Douglas*, the burden would then shift to Tresler.

The record before the court would allow Tresler to easily satisfy his burden of showing a legitimate, nondiscriminatory reason for his actions. This court has already determined that Lum's contract was void, and a void contract provided a nondiscriminatory reason for Tresler's actions. As discussed above, Lum fails to raise a triable issue of fact as to whether Tresler conspired against Lum because of Lum's race, as Lum submits no evidence indicating that Tresler had any racial animus when he voided Lum's contract. To the contrary, Lum's assertion of race discrimination is based entirely on conclusory allegations, which are insufficient to satisfy Lum's summary judgment burden. *See Forsberg v. Pac. Northwest Bell Tel. Co.*, 840 F.2d 1409, 1419 (9th Cir. 1988) (explaining that conclusory allegations of discrimination are insufficient to preclude summary judgment). As Lum fails to meet his burden of demonstrating that the void contract is a pretext or a cover-up of his discriminatory acts, Tresler is entitled to summary judgment on Lum's § 1981 claims, even assuming they were not waived.

C. Lum Has Conceded That Summary Judgment in Favor of Tresler on the Fifth Claim for Relief is Proper.

Tresler has moved for summary judgment on Lum's Fifth Claim for Relief, which is based on the Hawaii Whistleblowers' Protection Act. Lum has conceded that

Tresler is entitled to summary judgment on that claim. *See* Opposition at 37 ("Plaintiff will concede Tresler's argument that he is entitled to summary judgment as to the HWPA claim against him."). Accordingly, summary judgment is granted in favor of Tresler on the Fifth Claim for Relief asserted in the Fourth Amended Complaint.

V. *CONCLUSION.*

The court grants summary judgment in favor of Tresler. No claims remain against Tresler. This order leaves for further adjudication the First, Second, Third, and Fifth Claims for relief, to the extent those claims are asserted against Defendants County of Kauai, Kauai County Council, Bryan Baptiste, and Leon Gonsalves, Sr.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, September 25, 2007.

/s/ Susan Oki Mollway

United States District Judge

Footnotes

1 The first clause of section 1985(2) concerns conspiracies to obstruct justice in the federal courts, or to intimidate a party, witness or juror in connection therewith. The third clause of § 1985(3) concerns conspiracies to interfere with federal elections. Lum says that he is not asserting violations of these clauses.

2 Lum's reliance on *Brewer v. Hoxie Sch. Dist.*, 238 F.2d 91 (8th Cir. 1956), to demonstrate a violation of the second clause of § 1985(3) is misplaced. In *Brewer*, a school board desegregated a school system. The defendants then attempted to obstruct that desegregation. The Eighth Circuit determined that the school board could assert a claim against the defendants under the second clause of § 1985(3), because the defendants had conspired to hinder state authorities from giving or securing equal protection to the children in the desegregated schools. *Id.* at 103-04. By contrast, Lum offers no evidence that Tresler conspired with others to hinder state authorities from securing equal protection to others.

3 At the hearing, Lum admitted that Tresler's actions with respect to Mike Ching were not based on Ching's race.

4 42 U.S.C. § 1981(a) states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Civ. No. 06-00068 SOM/BMK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

KING C. LUM, Plaintiff,

vs.

KAUAI COUNTY COUNCIL, et al., Defendants.

May 18, 2007, Decided
May 18, 2007, Filed

Susan Oki Mollway, United States District Judge.

ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

I. *INTRODUCTION*

Plaintiff King C. Lum ("Lum") has filed his Fourth Amended Complaint [1] ("Complaint") against Defendants County of Kauai ("the County"), Kauai County Council ("the Council"), Bryan Baptiste ("Mayor Baptiste"), Michael H. Tresler ("Director Tresler"), and Leon Gonsalves, Sr. [2] In the Complaint, Lum asserts the following claims: (1) discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and Haw. Rev. Stat. § 378-2 (Count 1); (2) violation of 42 U.S.C. § 1981 (Count 2); (3) civil conspiracy to discriminate under 42 U.S.C. §§ 1981 and 1985 (Count 3); (4) violation of his procedural due process rights and of "the public policy of the State of Hawaii," and "breach of [Lum's] employment contract" (Count 4); and (5)

violation of the Hawaii Whistleblowers' Protection Act, Haw. Rev. Stat. § 378-62 (Count 5). Lum prays for declaratory and injunctive relief, as well as compensatory and punitive damages.

On December 22, 2006, the County, the Council, Baptiste, and Tresler (collectively, "Defendants") moved for partial summary judgment on Lum's claim for violation of his procedural due process rights. [3] The court held a hearing on Defendants' motion on March 5, 2007, at which time the court requested supplemental briefing on whether Lum had a property interest in his employment entitling him to procedural due process. The court held another hearing on May 7, 2007, and thereafter requested further supplemental briefing. This order addresses issues raised in both the original and supplemental papers.

Regarding Lum's procedural due process claim, Defendants argue that Lum had no property interest in his job because his contract was void. Defendants also contend that, because Lum was an at-will employee, he could not have had any property interest in his employment. Alternatively, they argue that, even if Lum had a property interest in his employment, his "resignation from employment is a voluntary relinquishment of any property interests he might have had." In response, Lum argues that he had a property interest in his employment because "the wrongdoing alleged in the instant case was that of a third-person" and because he "had been working for several years as the Kauai Police Chief." Regarding his resignation, Lum argues that he was constructively discharged.

The court grants summary judgment on Lum's

procedural due process claim. Because Lum's contract is void, it created no property interest in his employment.

Defendants' supplemental papers clarify that they seek summary judgment on the remaining claims in Count 4. Because those claims are based on the cancellation of Lum's void employment contract, and because Lum has had ample opportunity to address Defendants' arguments, the court grants summary judgment in favor of Defendants on those claims as well.

II. *LEGAL STANDARD.*

Summary judgment shall be granted when

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c); *see also Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000). One of the principal purposes of summary judgment is to identify and dispose of factually unsupported claims and defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Summary judgment must be granted against a party that fails to demonstrate facts to establish what will be an essential element at trial. *See id.* at 323. A moving party without the ultimate burden of persuasion at trial--usually, but not always, the defendant--has both

the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). The burden initially falls upon the moving party to identify for the court "those portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

"When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The nonmoving party may not rely on the mere allegations in the pleadings and instead must "set forth specific facts showing that there is a genuine issue for trial." *Porter v. Cal. Dep't of Corr.*, 419 F.3d 885, 891 (9th Cir. 2005). "A genuine dispute arises if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *California v. Campbell*, 319 F.3d 1161, 1166 (9th Cir. 2003).

When "direct evidence" produced by the moving party conflicts with "direct evidence" produced by the party opposing summary judgment, "the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact." *T.W. Elec. Serv.*, 809 F.2d at 631. In other words, evidence and inferences must be construed in the light most favorable to the nonmoving party. *Porter*, 419 F.3d at 891. The court does not make credibility determinations or weigh conflicting evidence at the summary judgment stage. *Id.* However, inferences may be drawn from underlying

facts not in dispute, as well as from disputed facts that the judge is required to resolve in favor of the nonmoving party. *T.W. Elec. Serv.*, 809 F.2d at 631.

III. *BACKGROUND FACTS.*

Lum joined the Kauai Police Department ("KPD") in 1983. Declaration of King C. Lum (2/13/2007) ("Lum Decl'n") ¶ 2. In March 2004, Lum, then a KPD lieutenant, applied to be the Chief of Police. *Id.* ¶ 4. On April 16, 2004, the Kauai Police Commission ("the Commission") appointed Lum Interim Chief of KPD for a term beginning on May 1, 2004, until September 29, 2004, when he was appointed Chief of Police. *Id.* ¶¶ 5-6. Michael Ching ("Commissioner Ching") was a member of the Commission that appointed Lum Chief of Police. Ex. A (attached to Motion) ¶ 1

Lum's employment contract with the Commission provided for a five-year term as the Chief of Police, to "end at midnight on September 28, 2009." Ex. A (attached to Opp.) at 1; Lum Decl'n ¶ 7. The employment contract also stated that Lum may be terminated as follows:

> (a) *Pursuant to Charter:* By the Commission at any time prior to the expiration of the term of your employment under this agreement and after being given a written statement of the charges against you and a hearing before the Commission pursuant to Section 11.04 of the Charter. If you are terminated in this manner, all compensation to which you are entitled shall cease on the effective date of the termination; provided, however, that you will be entitled to

> receive all vested and/or accrued benefits for which you are eligible on the date of termination.
>
> (B) *At expiration of term:* Unless extended by a separate written agreement, *K.C. Lum's* employment hereunder shall be terminated at the expiration of the term hereof.

Ex. A (attached to Opp.) at 1-2 (emphases in original).

Some time before February 23, 2006, the County appointed a hearing officer to hear and issue findings of fact and conclusions of law on whether Commissioner Ching had violated the Kauai County Charter and the Kauai County Code of Ethics in approving Lum to be the Chief of Police. *See generally* Ex. A (attached to Motion).

On February 23, 2006, the hearing officer issued his findings and recommendations. *Id.* at 23. The hearing officer found that Commissioner Ching "actively solicited support for Lum from [the State of Hawaii Organization of Police Officers ('SHOPO')]" and that he "used his position to secure an unwarranted advantage and treatment for [Lum] over the other candidates for Chief of Police." *Id.* at 20; Ex. D (attached to Motion) at 2. In light of those findings, the hearing officer concluded, "In nominating, advocating for and voting for [Lum] as Interim Chief, [Commissioner Ching] used his official position for the benefit of [Lum] and thereby violated the Kauai County Code of Ethics under the Kauai County Charter, Article XX, Section 20.02E and the Kauai County Code, Chapter 3, Article I, section [3]-1.6 ('Fair Treatment')." [4] Ex. A (attached to Motion) at 21. The hearing officer recommended that "this

matter be referred to the County Council for appropriate action." *Id.*

On March 23, 2006, based on the hearing officer's findings and recommendations, the Kauai Board of Ethics ("Board of Ethics") recommended to the Council that "the Director of Finance void the County's contract with [Lum]." Ex. G (attached to Motion) at 1. On April 12, 2006, the Council "accepted and ratified the recommendations of the [Board of Ethics] regarding . . . [t]he cancellation of [Lum's] contract, in accordance with Section 3-1.11(a) and (b) of the Kauai County Code." Ex. H (attached to Motion) at 1. Section 3-1.11 of the Kauai County Code provides:

Sec. 3-1.11 Violation; Penalties.

> (a) In addition to any other penalty provided by law, any contract entered into by the County in violation of this Article is voidable on behalf of the County at the option of the Director of Finance, provided that in any action to avoid a contract pursuant to this Section the interests of third parties who may be damaged thereby shall be taken into account, and the action to void the transaction is initiated within sixty (60) days after the determination of a violation under this Article. The County Attorney shall have the authority to enforce this provision.
>
> (b) Any favorable county action obtained in violation of any of the standard for councilmen or employees is voidable in the same manner as voidable contracts as provided for under Section 3-1.11(a); and the County by the County

> Attorney may pursue all legal and equitable remedies available to it.

On April 27, 2006, pursuant to the Council's recommendation and section 3-1.11's requirement that the interests of third parties be considered, the Director of Finance, Director Tresler, sent a letter to Lum asking him to "please provide me with any facts, documents, reasons and/or justifications explaining why I should not cancel your employment agreement *within seven (7) calendar days from the date of this letter*." Ex. I (attached to Motion) at 2 (emphases in original). On May 4, 2006, Lum's attorney sent a letter to Director Tresler, requesting that Lum "be given a hearing to afford him his due process rights as required by the Fifth and Fourteenth Amendments to the U.S. Constitution." Ex. J (attached to Motion) at 2. Via letter dated May 12, 2006, Director Tresler's attorney told Lum:

> [W]ith respect to your request for a hearing, KCC Section 3-1.11(a) provides in relevant part that, "in any action to avoid a contract pursuant to this section the interests of third parties who may be damaged thereby shall be taken into account." KCC Section 3-1.11(b) does not provide any requirements for a hearing as it relates to an action to cancel a contract made pursuant to this section. This section requires that the interests of Chief Lum be taken into account.
>
> Director Tresler will provide Chief Lum with an opportunity to make a private, transcribed oral presentation to him as to how his interest will be affected by the potential cancellation of the

> employment. We would request that this presentation be made within *seven (7) calendar days from the date of this letter.* However, it should be understood that this oral presentation will not entail the examination and/or crossexamination of any witnesses. Director Tresler will listen to Chief Lum's statement, but will not comment nor engage in any discussion regarding the substance of his claims. As Director Tresler will be accompanied by counsel, Chief Lum may be represented by counsel at the presentation.

Ex. K (attached to Motion) at 2. In response, Lum "decline[d] to make a personal appearance before [Director Tresler]." Ex. L (attached to Motion) at 2.

On May 30, 2006, Director Tresler's attorney sent a letter to Lum's attorney, informing Lum that, after "fully consider[ing] Lum's interests," Director Tresler concluded that "Lum's Employment Agreement is voidable." Ex. B (attached to Opp.) at 2. The letter also informed Lum of Director Tresler's "decision to cancel [Lum's] October 15, 2004 Employment Agreement . . . with the [KPD] pursuant to Sections 3-1.11(a) and (b) of the Kauai County Code." Ex. B (attached to Opp.) at 1. The letter stated:

> In considering the interests of Chief Lum, Director Tresler learned that a lieutenant's position is available within the [KPD]. We understand that Chief Lum may be reinstated in that position. In order to avoid a gap in his employment record with the County, which gap might adversely [a]ffect his retirement or

> employment status, Director Tresler will actually cancel the contract on June 7[, 2006]. During this one week period, if your client is inclined to return to his prior position of lieutenant, please have him make an appointment to see Gary Heu, the Mayor's executive assistant, so they can discuss his re-employment.

Ex. B (attached to Opp.) at 3.

On May 31, 2006, Lum sent a letter to the Commission stating:

> My employment contract will be cancelled on June 8, 2006 by [Director Tresler]. . . . A telephone conversation on May 31, 2006 with Gary Heu, the Mayor's Executive Assistant, revealed that I will no longer be considered an employee of the County on June 8, 2006. I must request reinstatement to my former rank of lieutenant before I can continue to be an employee of the County. When I asked Heu about the legality of the action, he stated, "the attorneys just have to beef it out."
>
> As such, I will retire from police service at the close of business on June 7, 2006.

Ex. O (attached to Motion) at 2.

IV. *ANALYSIS.*

A. *Lum's Procedural Due Process Claim*

Defendants argue that Lum's "employment agreement was void from the outset as a matter of law because it was entered into as the result of a tainted and flawed selection process." Defendants' 3/15/2007 Supp. at 6. Defendants contend, "An employment contract that is null and void is incapable of creating a property interest since such a contract cannot conceivably give rise to a legitimate expectation of continued employment." Motion at 11. Defendants assert that, because Lum's "employment contract was determined to have been entered into in violation of the Code of Ethics," Lum had "no property interest worthy of protection by the Due Process Clause." Motion at 15. Lum responds that he had a property interest in his employment because "the wrongdoing alleged in the instant case was that of a third-person" and because he "had been working for several years as the Kauai Police Chief." Lum's 4/18/2007 Supp. Opp. at 7. The court agrees with Defendants that Lum had no property interest in his employment.

The Fourteenth Amendment to the United States Constitution provides, "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." The Ninth Circuit says, "A procedural due process claim has two distinct elements: (1) a deprivation of a constitutionally protected liberty or property interest, and (2) a denial of adequate procedural protection." *Brewster v. Bd. of Educ. of the Lynwood Unified Sch. Dist.*, 149 F.3d 971, 982 (9th Cir. 1998). Before examining whether Lum was deprived of a property interest in his position as Chief of Police without due process, the court must first determine whether Lum indeed had a protected property interest.

"Property interests are not created by the Constitution." *Id.* (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)). "Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.'" *Id.* (citing *Roth*, 408 U.S. at 577). "In order to possess a property interest in a benefit, an individual must have more than 'an abstract need or desire for it' or 'a unilateral expectation of it.'" *Id.* Rather, an individual must possess "a legitimate claim of entitlement to it." *Id.*

Although Hawaii courts have not addressed the precise issue before this court, other courts that have addressed the issue hold that employment contracts or appointments that violate state or county law are void as a matter of law and do not create property interests in employment. For example, in *Bailey v. City of Lawrence, Indiana*, 972 F.2d 1447, 1448 (7th Cir. 1992), the plaintiff, who had been appointed to the Lawrence Police Department the day before his thirty-sixth birthday, was terminated because Illinois law prohibited appointments "after the person has 'reached thirty-six (36) years of age.'" *Id.* The district court concluded on summary judgment that the plaintiff had no property interest in his employment, as the plaintiff "had been ineligible for appointment to the police force because Indiana had adopted the 'coming of age' rule under which [the plaintiff] had 'reached thirty-six (36) years of age' the day before his birthday." The appointment was therefore void. *Id.* On appeal, the Seventh Circuit acknowledged, "If [the plaintiff's]

appointment was invalid, then he had no property interest and therefore had no right to due process before being discharged." *Id.* at 1449. However, because the Seventh Circuit found that the plaintiff "had not reached thirty-six (36) years of age" prior to his appointment, the court ultimately vacated the district court's decision that the appointment was void. *Id.* at 1452.

In another case originating in Illinois, *Shlay v. Montgomery*, 802 F.2d 918, 919 (7th Cir. 1986), the plaintiff alleged that he had been wrongfully deprived of a property interest in continued employment as a Chicago assistant corporation counsel. The plaintiff was terminated from his job because he did not live in Chicago, a condition of employment. *Id.* The district court granted summary judgment to the defendants, and the plaintiff appealed. *Id.* The Seventh Circuit concluded that the employment contract was "in contravention of Illinois law at the time he was hired." *Id.* at 921-22. The court said, "[C]ontracts which are in violation of law are null and void." Because "contracts which are null and void are incapable of creating property interests since such contract cannot conceivably give rise to a legitimate expectation of continued employment," the plaintiff's employment contract did not create a protected property interest. *Id.*

Similarly, in *Walters v. Village of Colfax*, 466 F. Supp. 2d 1046, 1048-49 (C.D. Ill. 2006), the plaintiff had a ten-year contract for employment as Chief of Police. The plaintiff was eventually terminated and sued village officials, claiming that they had deprived him of his employment without procedural due process. *Id.* at

1051. The defendants moved for summary judgment on the ground that no property interests arose from the employment contract because "the duration term in the 2002 contract violates Village Ordinances and municipal law." *Id.* The district court agreed with the defendants that, because the contract's duration was contrary to municipal law, the contract was "void from the moment of execution." *Id.* at 1056. The "completely void" employment contract "did not exist and cannot provide [the plaintiff] with a protectable property interest." *Id.* at 1057.

Other jurisdictions agree that void contracts create no protected property interests. In *City of Beaumont v. Spivey*, 1 S.W.3d 385, 387 (Tex. Ct. App. 1999), the plaintiff was hired by the Beaumont Police Department, having scored "the second highest grade on the exam." After investigating allegations that the plaintiff "obtained a copy of the entry level exam from [a] former Beaumont police officer" and concluding that the plaintiff had studied a copy of the actual examination before taking the test, the city ended the plaintiff's employment. *Id.* at 388. The Texas Court of Appeals upheld "the factual sufficiency of the trial court's finding that Spivey was given the actual exam prior to taking it and that he cheated on the examination." *Id.* at 395. Because the plaintiff's actions were contrary to state law, which required that his appointment be "based on a competitive examination," the court concluded that "his appointment as a police officer was not in substantial compliance with [state law] and is void *ab initio*." *Id.* at 395-96. As a result, he had no property rights in his employment under state law. *Id.* at 396.

Walsh v. Bollas, 82 Ohio App. 3d 588, 612 N.E.2d 1252, 1254 (Ohio App. 1992), also holds that no property interest arises from a void contract. In *Walsh*, the plaintiff appealed after the court of common pleas declared his employment contract void. The plaintiff had been hired by the sheriff's office, while his father-in-law was the county sheriff. *Id.* at 1253. State law "prohibited a county sheriff from authorizing a contract for employment of his family member as a public employee." The Ohio Court of Appeals affirmed the lower court's decision that the plaintiff's contract was void. *Id.* at 1255-56. Because "no rights may arise from an illegal contract," the plaintiff was not entitled to procedural guarantees. *Id.* at 1256.

Lum does not dispute that employment contracts or appointments that are contrary to state or municipal law are void and can create no property interest in employment. Instead, Lum argues that he had a property interest in his employment because "the wrongdoing alleged in the instant case was that of a third-person" and because "he had been working for several years as the Kauai Police Chief." Lum's 4/18/2007 Supp. Opp. at 2 7 (citing *Berns v. Civil Serv. Comm'n*, 537 F.2d 714 (2d Cir. 1976); *Hewitt v. D'Ambrose*, 418 F. Supp. 966 (S.D.N.Y. 1976); *In re Petitioner N*, 139 Misc. 2d 634, 528 N.Y.S.2d 794 (N.Y. Sup. Ct. 1987)). Each case Lum relies on is distinguishable from the present case.

In *Berns*, 537 F.2d at 716, and *Hewitt*, 418 F. Supp. at 969, the employees were found to have property interests in their employment because they had satisfactorily completed their six-month probationary periods. Thus, under New York law, the employees

became "permanent employees" and were entitled to procedural due process. *Berns*, 537 F. 2d at 716 ("Under New York law, Berns achieved [a property interest in her job] when she was retained beyond her six month probationary period."); *Hewitt*, 418 F. Supp. at 969 ("Hewitt, having satisfactorily completed his probationary period and having achieved 'permanent' employee status, was entitled to all of the procedural safeguards guaranteed by the fourteenth amendment."). In the present case, however, nothing in the record suggests that Lum was working under any provision or condition, such as completion of a probationary period, that transformed him into someone with a protected property interest in his job. Similarly, *In re Petitioner N*, 139 Misc. 2d at 635, is distinguishable because the New York Supreme Court was faced with determining whether property rights arose from a contract for the sale of real property, not from an employment contract. The court is therefore unpersuaded by any of the cases Lum cites.

The hearing officer concluded that Commissioner Ching violated the Kauai County Code and the Kauai County Code of Ethics by "nominating, advocating for and voting for [Lum] as Interim Chief." Ex. A (attached to Motion) at 21. Based on the hearing officer's findings and recommendations, the Board of Ethics recommended to the Council that Director Tresler void Lum's employment contract. Ex. G (attached to Motion) at 1. The Council, having accepted and ratified the Board of Ethics' recommendations, referred "the matter of the cancellation of [Lum's] employment contract to" Director Tresler." Ex. H (attached to Motion) at 1-2. Pursuant to section 3-1.11(a) of the Kauai County Code, Director Tresler concluded, after

fully considering Lum's interests, that Lum's employment contract was "voidable." Ex. B (attached to Opp.) at 2-3.

Although, given Lum's notice of resignation, Director Tresler did not actually declare the contract void or cancel the employment contract, Lum's appointment and contract became void as a matter of law once it was determined that Lum had become the Chief of Police via a process that violated County law. *See Bailey*, 972 F.2d at 1448-49; *Shlay*, 802 F.2d at 921-22; *Walters*, 466 F. Supp. 2d at 1057; *Walsh*, 612 N.E.2d at 1255-56; *Spivey*, 1 S.W.3d at 395-96. To conclude otherwise would allow Lum to create a property interest simply by resigning before a formal declaration that the contract was void (not just "voidable") had occurred. This would make no sense.

Hawaii courts recognize that a void contract is "no contract at all." *Standard Finance Co. v. Ellis*, 3 Haw. App. 614, 618, 657 P.2d 1056, 1059 (Haw. App. 1983). Because void contracts create no property interests, no property interest in employment arose from Lum's void contract. *See Bailey*, 972 F.2d at 1449; *Shlay*, 802 F.2d at 922; *Walters*, 466 F. Supp. 2d at 1056; *Walsh*, 612 N.E.2d at 1256; *Spivey*, 1 S.W.3d at 396. The court therefore grants summary judgment in favor of Defendants on Lum's procedural due process claim. [5]

B. *Lum's Remaining Claims in Count 4.*

Although Defendants' original motion sought summary judgment on only the due process claim in Count 4, their supplemental papers clarify that they seek "summary judgment on the entire Fourth Claim for

Relief." Defendants' 4/9/2007 Supp. at 2. Defendants posit, "It is undisputed that the Fourth Claim For Relief is based entirely on the operative facts pertaining to [Lum's] allegations concerning the cancellation of his employment agreement." Defendants' 4/9/2007 Supp. at 19. Defendants therefore contend, "if this Honorable Court finds that partial summary judgment on [Lum's] due process claim is proper, then partial summary judgment should also be granted as to the entire Fourth Claim For Relief." The court agrees.

Count 4 asserts three claims: "denial of due process and attempt to violate the public policy of the State of Hawaii and a breach of [Lum's] employment contract with County of Kauai." Complaint ¶ 65. The Complaint makes clear that all claims in Count 4 are based on the cancellation of Lum's employment contract. *Id.* ¶¶ 47-49, 65. Because the contract is void, any argument that its cancellation violated public policy or breached the contract fails as a matter of law. The court therefore grants summary judgment on the remaining claims in Count 4.

V. *CONCLUSION.*

The court grants summary judgment in favor of moving Defendants on Count 4. All other claims remain for future adjudication.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, May 18, 2007.

Susan Oki Mollway

United States District Judge

Footnotes

1 Lum filed the Third Amended Complaint on December 14, 2006. At the May 7, 2007, hearing on this matter, the court, for reasons stated at the hearing, ordered Lum to file a Fourth Amended Complaint, which was to be identical to the Third Amended Complaint except for its title, no later than May 8, 2007. At the hearing, the court also deemed all moving papers filed after December 14, 2006, to relate to the Fourth Amended Complaint.

On May 8, 2007, Lum did file the Fourth Amended Complaint. As ordered earlier, the present motion and papers relate to the Fourth Amended Complaint.

2 Lum sues Baptiste, Gonsalves, and Tresler in their individual and official capacities.

3 Defendant Leon Gonsalves, Sr., neither moved for summary judgment nor joined in the present motion.

4 Section 20.02E of Article XX, Code of Ethics, Kauai County Charter provides: "No officer or employee of the county shall . . . [u]se his official position to secure a special benefit, privilege or exemption for himself or others." At the May 7, 2007, hearing, Lum argued that Commissioner Ching violated section 20.03, but the hearing officer did not find that Ching violated that section. *See* Ex. A (attached to Motion) at 21.

Chapter 3, Article I, section 3-1.6 of the Kauai County Code provides: "No councilman or employee of the

County shall use or attempt to use his official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment for himself or others . . . ."

5 Because the court concludes that Lum had no property interest in his employment as Chief of Police, the court need not and does not address Defendants' alternative arguments that Lum was an at-will employee or that Lum's resignation negated any property interest in his employment.

2/11/2010
No. 08-16093
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KING C. LUM,
Plaintiff – Appellant,
v.
KAUAI COUNTY COUNCIL; BRYAN BAPTISTE, individually, and in his capacity as the Mayor of Kauai County, State of Hawaii; LEON GONSALVES, SR., individually, and in his capacity as a Commissioner, Kauai Police Commission; MICHAEL H. TRESLER, individually, and in his capacity as the Director of Finance, Kauai County; KAUAI COUNTY; and JOHN DOES 1 to 20 and JANE DOES 1 to 20,
Defendants – Appellees.

ORDER

Before: BEEZER, GRABER and FISHER, Circuit Judges.

The panel judges have voted to deny Appellant's petition for panel rehearing. Judges Graber and Fisher voted to deny the petition for rehearing en banc, and Judge Beezer recommended denying the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's petition for panel rehearing and petition for rehearing en banc, filed December 18, 2009, is DENIED.

No. 09-1548

JUL 20 2010

In The
Supreme Court of the United States

KING C. LUM,

Petitioner,

v.

KAUAI COUNTY COUNCIL; BRYAN BAPTISTE, individually, and in his capacity as the Mayor of Kauai County, State of Hawaii; LEON GONSALVES, SR., individually, and in his capacity as a Commissioner, Kauai Police Commission; MICHAEL H. TRESLER, individually, and in his capacity as the Director of Finance, Kauai County; KAUAI COUNTY; and JOHN DOES 1 to 20 and JANE DOES 1 to 20,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENT LEON GONSALVES, SR.

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QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals correctly affirmed summary judgment in favor of Respondent Leon Gonsalves, Sr.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF THE CASE	1
A. STATEMENT OF FACTS	1
B. STATEMENT OF THE CASE	3
REASONS WHY THE PETITION SHOULD BE DENIED	6
CONCLUSION	7

TABLE OF AUTHORITIES

Page

RULES OF COURT

Rules of the Supreme Court of the United States

Rule 10 6

STATUTES

United States Code

42 U.S.C. § 1981 ..... 3, 5

42 U.S.C. § 1985 5

42 U.S.C. § 2000e-2, et seq. 3, 4

HAWAII REVISED STATUTES

§ 378-2 3

§ 378-2(1)(A) 4

§ 378-2(2) 4

§ 378-2(3) 4

§ 378-61 5

§ 378-62 5

COUNTERSTATEMENT OF THE CASE

A. STATEMENT OF FACTS

Respondent Leon Gonsalves, Sr. (hereinafter "Gonsalves") was a Police Commissioner for Kauai County since his appointment by Mayor Baptiste in March 2004. In approximately April of 2004, acting police chief Wilfred Ihu left. Petitioner King C. Lum (hereinafter "Petitioner") and other candidates applied for the position of police chief. At a Commission meeting in April 2004, Gonsalves voiced his concerns about Petitioner's leadership ability and stated that the interim chief should not be chosen from candidates for permanent chief.

Only Petitioner was called and asked to be interim chief. Gonsalves and another commissioner voted against Petitioner as interim police chief. Petitioner was appointed as interim chief of police in May, 2004.

During the selection process for a new chief of police, Gonsalves tried to inform the Commission about Petitioner's involvement in the so-called "FantaSee Express Affair" and submitted the sworn testimony of Officer Darla Abbatiello.

Gonsalves voted against Petitioner but was outvoted by a margin of 4-1. On September 29, 2004, Petitioner was appointed as chief of police.

On September 30, 2004, Gonsalves sent a memo to the Kauai Board of Ethics, expressing his strong concerns regarding the selection process.

On October 14, 2004, Gonsalves sent an e-mail that referred to Petitioner.

On November 1, 2004, Gonsalves met with Petitioner in the Mayor's office and apologized to Petitioner. Petitioner claims that he accepted the apology and put the entire matter behind him.

Shortly thereafter, Petitioner initiated the process of filing a complaint with the Hawaii Civil Rights Commission (hereinafter "HCRC") against Gonsalves. Petitioner filed a complaint with the HCRC on April 7, 2005.

On February 18, 2005, Gonsalves wrote a memo to Chairman Michael Ching regarding his continuing concerns about the Petitioner's performance as chief of police, including the civilian take-home car program.

On September 23, 2005, Gonsalves wrote a memo to the Commission expressing his concerns regarding Petitioner's performance as chief of police, including a huge budget overrun and what Gonsalves believed was an alarming rate at which officers were leaving the Department. On September 26, 2005, Gonsalves wrote a memo in which he sought sanctions for Petitioner's handling of the budget and other matters.

On February 23, 2006, Judge McConnell issued a decision in the Board of Ethics inquiry, finding that there were improprieties in the selection process and that Commissioner Ching improperly campaigned for Petitioner and violated the County's Code of Ethics.

After evaluating Judge McConnell's decision, Kauai County determined that the process by which Petitioner was chosen was flawed and notified Petitioner on or about May 30, 2006. Petitioner resigned from his position of chief of police, rather than return to his original position as a Lieutenant in KPD.

Gonsalves had no part in Kauai County's decision to remove Petitioner or Petitioner's decision to resign.

B. STATEMENT OF THE CASE

On May 8, 2007, Petitioner filed a Fourth Amended Complaint for Declaratory and Injunctive Relief and Damages against Gonsalves, Respondents Kauai County Council, Bryan Baptiste, individually and in his capacity as the Mayor of Kauai, Michael Tresler, and Kauai County, and various Doe Defendants. Petitioner alleges five claims for relief: discrimination and reprisal in violation of 42 U.S.C. § 2000e-2, et seq. and Hawaii Revised Statutes (HRS) § 378-2 (first claim); violation of 42 U.S.C. § 1981 (second claim); civil conspiracy (third claim); due process, public policy and breach of contract (fourth claim); and violation of Hawaii Whistleblowers' Protection Act (fifth claim). The fourth claim for relief does not allege claims against Gonsalves.

On May 18, 2007, the district court issued an "Order Granting Defendants' Motion for Partial Summary Judgment" with respect to the motion filed by

Respondents Kauai County Council, Bryan Baptiste, and Michael Tresler.

On November 9, 2007, the district court issued an Amended Order granting Gonsalves' Motion for Summary Judgment.

On December 1, 2009, the Ninth Circuit Court of Appeals affirmed judgment in favor of Gonsalves and the other Respondents. Petitioner mischaracterizes the reasons for the Ninth Circuit's ruling in favor of Gonsalves. Contrary to Petitioner's contentions, Petitioner's claims of race discrimination, retaliation for filing a race discrimination complaint and whistleblowing activities were not dismissed "on the basis that [Petitioner] did not have a property interest in his continued employment as the Kauai police chief." (Petition at 16).

The Ninth Circuit agreed with the district court that Petitioner "raised no issue of material fact in his several claims against [Gonsalves]." The Ninth Circuit gave specific reasons for upholding the dismissal of each claim against Gonsalves. (*See* Ninth Circuit opinion, Petition Appendix at 4a-6a).

First, the Ninth Circuit agreed that there is no individual liability under Title VII, 42 U.S.C. § 2000e-2. Second, the Ninth Circuit agreed that there is no individual liability under Hawaii Revised Statutes § 378-2(1)(A) and (2). The Ninth Circuit also held that Petitioner failed to provide any evidence in support of his § 378-2(3) claim that Gonsalves aided and abetted discriminatory action.

Third, the Ninth Circuit affirmed summary judgment on Petitioner's § 1981 claims on the ground that Petitioner's evidence showed no more than "isolated incidents" that did not support a hostile work environment claim. The Ninth Circuit also ruled that Petitioner did not have a viable retaliation claim because he did not show that Gonsalves took any adverse employment action.

Fourth, the Ninth Circuit affirmed summary judgment on Petitioner's § 1985 claim against Gonsalves. The Ninth Circuit said that even assuming that Petitioner could show that Gonsalves was racially motivated, Petitioner offered no evidence of a conspiracy between Gonsalves and anyone else to deprive Petitioner of equal protection.

Fifth, the Ninth Circuit noted that the district court ruled that there is no individual liability under the Hawaii Whistleblowers' Protection Act, Haw. Rev. Stat. § 378-62. Citing § 378-61, the Ninth Circuit said that even if there is individual liability, it can attach at most to an agent of the employer. The Ninth Circuit held that Petitioner failed to provide evidence that Gonsalves should be considered an agent of Petitioner's employer, Kauai County, much less that Gonsalves's retaliatory actions were taken in his capacity as an agent.

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner has explicitly excluded his claims against Gonsalves from the scope of the Petition. Petitioner states that his claims of race discrimination, retaliation for filing a race discrimination complaint and whistleblowing activities and allegations "are not part of this appeal." (Petition at 16).

None of the "questions presented" in the Petition pertain to Petitioner's claims against Gonsalves. None of the arguments under Petitioner's "Reasons for Granting the Petition" pertain to Petitioner's claims against Gonsalves. Petitioner's "questions presented" and arguments all relate to termination of employment. Petitioner does not dispute that Gonsalves had no part in Kauai County's decision to remove Petitioner or Petitioner's decision to resign. Petitioner does not challenge the Ninth Circuit's ruling that Petitioner failed to provide evidence that Gonsalves was an agent of Petitioner's employer, Kauai County.

Petitioner fails to demonstrate compelling reasons that would warrant a grant of certiorari. Instead of addressing the criteria for a grant of certiorari pursuant to Rule 10 of the Rules of the Supreme Court of the United States, Petitioner merely attempts to reargue the merits of his appeal to the Ninth Circuit and the merits of his opposition to the other Respondents' motions for summary judgment.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated July 2010

No. 09-1548

JUL 21 2010

In The Supreme Court of the United States

KING CHI LUM,

Petitioner,

v.

KAUAI COUNTY COUNCIL; BRYAN BAPTISTE, individually, and in his capacity as the Mayor of Kauai, State of Hawaii; LEON GONSALVES, SR., individually, and in his capacity as a Commissioner, Kauai Police Commission; MICHAEL H. TRESLER, individually, and in his capacity as the Director of Finance, Kauai County; KAUAI COUNTY, and JOHN DOES 1 to 20 and JANE DOES 1 to 20,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS KAUAI COUNTY COUNCIL, BRYAN BAPTISTE, MICHAEL H. TRESLER, AND KAUAI COUNTY'S BRIEF IN OPPOSITION TO PETITIONER KING CHI LUM'S PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Ninth Circuit Court of Appeals correctly affirmed the District Court's decision in favor of Respondents COUNTY OF KAUAI ("the County"), KAUAI COUNTY COUNCIL ("the Council"), Mayor BRYAN BAPTISTE ("Mayor Baptiste") and MICHAEL H. TRESLER ("Director Tresler") (collectively referred to as "County Respondents"), holding that a contract void *ab initio* does not give rise to a property interest that triggers Due Process protection under the 14th Amendment.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

I. STATEMENT OF THE CASE 1

A. Factual History 1

B. Procedural History 4

II. SUMMARY OF ARGUMENT 8

III. ARGUMENT 9

A. Certiorari Is Not Warranted Because Petitioner Merely Repeats His Previously Unsuccessful Arguments Without Articulating A Conflict Or Departure From Judicial Proceedings Necessitating Review By This Court 9

B. Review Of The Question Presented On The Merits Confirms That The Ninth Circuit Court Of Appeals And District Court Properly Held That Petitioner Is Not Entitled To Due Process Protection, Therefore Negating Petitioner's Further Tangential Arguments Against Respondents 13

IV. CONCLUSION 22

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Aholelei v. Dept. of Public Safety, 488 F.3d 1144 (9th Cir. 2007) 12, 17

Bd. of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 14

Bollow v. Fed. Reserve Bank of S.F., 650 F.2d 1093 (9th Cir. 1981) 20

Brewster v. Bd. of Educ. of the Lynwood Unified School Dist., 149 F.3d 971 (9th Cir. 1998) 13

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) 11, 14, 21

Duignan v. United States, 274 U.S. 195 (1927) 12

Huskey v. City of San Jose, 204 F.3d 893 (9th Cir. 2000) 13

Int'l Union of Bricklayers & Allied Craftsman Local 20 v. Martin Jaska, Inc., 752 F.2d 1401 (9th Cir. 1985) 17

McClure v. Indep. School Dist. No. 16, Mayes County, Oklahoma, 228 F.3d 1205 (10th Cir. 2000) 11, 21

Pleva v. Norquist, 195 F.3d 905 (7th Cir. 1999) 14

Sanchez v. City of Santa Ana, 915 F.2d 424 (9th Cir. 1990) 11, 21

Shlay v. Montgomery, 802 F.2d 918 (7th Cir. 1986) 14, 19

Walters v. Village of Colfax, 466 F. Supp. 2d 1046 (C.D. Ill. 2006) 19

TABLE OF AUTHORITIES – Continued

Page

STATE CASES

Burk v. Sunn, 68 Haw. 80, 705 P.2d 17 (1985) 21

City of Beaumont v. Spivey, 1 S.W.3d 385 (Tex. App. 1999) 19

Hui Malama Aina O Ko'olau v. Pacarro, 4 Haw. App. 304, 666 P.2d 177 (1983) 11, 17, 18

Peine v. Murphy, 377 P.2d 708 (Haw. 1962) 20

Standard Finance Co., Ltd. v. Ellis, 3 Haw. App. 614, 657 P.2d 1056 (1983) 21

Waikiki Resort Hotel, Inc. v. City and County of Honolulu, 63 Haw. 222, 624 P.2d 1353 (1981) 11, 18

Walsh v. Bollas, 612 N.E.2d 1252 (Ohio Ct. App. 1992) 19, 20

FEDERAL STATUTES

42 U.S.C. § 1981 .....5, 6

42 U.S.C. § 1985 5

42 U.S.C. § 2000e-2 5

U.S. Const. amend. XIV .....*passim*

STATE STATUTES

Haw. Rev. Stat. § 378-2.....5

Haw. Rev. Stat. § 378-62.....5

TABLE OF AUTHORITIES – Continued

Page

OTHER

Rules of the Supreme Court of the United States, Rule 10 ..... 9, 10, 11

Kauai County Charter Article XX, Section 20.02E ... 2, 15

Kauai County Code § 3-1.6 ..... 2, 15

Kauai County Code § 3-1.11 ..... 2, 3, 15, 16

Restatement (Second) of Contracts § 163 cmt. a (1981) 21

I. STATEMENT OF THE CASE

A. Factual History

This case arises from the tainted process by which the Chief of Police for the County of Kauai Police Department ("KPD") was selected in 2003-04 by the Kauai Police Commission ("Commission").

In April 2004, the Commission selected Petitioner to serve as the Interim Chief by a 3-2 vote. Petitioner's selection as Interim Chief was controversial, not only because it deviated from the normal chain of command, but because it gave Petitioner advantages over the other candidates for the permanent position.

On November 18, 2005, a contested case hearing was held before Hearing Officer E. John McConnell, a highly respected retired State Circuit Court judge, concerning an ethics complaint that was filed against Police Commissioner Michael Ching ("Ching"), which the County of Kauai Board of Ethics ("Ethics Board") had investigated. Ching and the Ethics Board were each represented by counsel at all times during the contested case hearing. Each party was afforded a full and complete opportunity to call and examine witnesses, and to offer evidence. During the hearing, testimony was taken from Ching, several KPD officers and Respondent LEON GONSALVES, SR. ("Respondent Gonsalves").

On February 23, 2006, after carefully considering the totality of the evidence in light of the claims and contentions of each of the parties presented at the

contested case hearing, Judge McConnell determined that Ching violated Article XX, Section 20.02E of the Kauai County Charter and Chapter 3, Article 1, Section 3-1.6 of the Kauai County Code by actively soliciting support for Petitioner from the State of Hawaii Organization of Police Officers ("SHOPO") and by manipulating the selection process to place Petitioner in the Interim Chief position. According to Judge McConnell, Ching used his position as a Police Commissioner to secure an unwarranted advantage and treatment for Petitioner over the other candidates.

On March 23, 2006, the Ethics Board relied on Judge McConnell's decision and recommended to the Council that Director Tresler void the County's employment contract with Petitioner.

On April 12, 2006, after due deliberation, the Council unanimously accepted and ratified the recommendations of the Ethics Board to cancel Petitioner's employment agreement. On April 17, 2006, the Council informed the Director of Finance, Director Tresler, that after due deliberation, it unanimously accepted the recommendations of the Board of Ethics and voted to void Petitioner's employment contract.

On April 27, 2006, Director Tresler informed Petitioner of his intention to void Petitioner's employment agreement pursuant to Sections 3-1.11(a) and (b) of the Kauai County Code. Director Tresler also informed Petitioner that Section 3-1.11(a) stated in

part that, "in any action to avoid a contract pursuant to this section the interests of third parties who may be damaged thereby shall be taken into account." Director Tresler therefore gave Petitioner the opportunity to provide any facts, documents, reasons and/or justifications explaining why Petitioner's employment agreement should not be cancelled. On May 4, 2006, counsel for Petitioner responded to Director Tresler and requested a hearing for Petitioner.

On May 12, 2006, Petitioner was advised that Director Tresler had not made a final decision on whether to void the employment agreement. Petitioner was again advised that any such decision would be based on Judge McConnell's Findings of Fact and Conclusions of Law and his Hearing Officer's Report. With respect to his request for a hearing, Petitioner was told that Section 3-1.11 of the Kauai County Code did not require a hearing since this was an action to void a contract. Rather, the section required that Petitioner's interests be "taken into account" by Director Tresler, who offered Petitioner an opportunity to make a private, transcribed oral presentation discussing any effect the contract cancellation may have on his interests.

Petitioner rejected Director Tresler's offer to meet and to make an oral presentation. Despite the rejection, Petitioner was assured that Director Tresler would fully consider Petitioner's interests pursuant to Section 3-1.11(a) of the Kauai County Code.

On May 30, 2006, after fully considering and taking into account Petitioner's interests, Director Tresler informed Petitioner that his employment agreement would be voided because his selection as Police Chief was the result of a tainted and/or compromised selection process. Petitioner's employment agreement was to be cancelled on June 7, 2006 in order to provide Petitioner with sufficient time to be transferred back to his prior position of lieutenant without any break in service, if he so desired.

On May 31, 2006, before Petitioner's employment contract was officially cancelled, Petitioner submitted his resignation, stating that he would retire at the close of business on June 7, 2006.

The County Respondents did not terminate Petitioner from his position as Chief of Police. Rather, Petitioner's contract was to be voided because it was secured by a fraud that had been perpetrated from the inception of that contract. Petitioner was not denied any Due Process because he simply did not have any property interest in his void employment agreement. The Court of Appeals and District Court accordingly did not err in holding that County Respondents did not violate Petitioner's Due Process interests.

B. Procedural History

The present appeal arises from the Ninth Circuit Court of Appeals' decision to affirm the District Court's correct and reasoned decision in favor of

County Respondents regarding the cancellation of Petitioner's employment contract due to fraud. By merely repeating his previous arguments to the lower courts, Petitioner has not set forth any basis for which this Court should grant certiorari.

Petitioner alleges that various statutory and Constitutional rights were violated when his contract for employment as the Chief of Police for the KPD was cancelled. According to Petitioner, his employment contract was cancelled because he purportedly voiced his opposition to being subjected to an alleged racial slur by Respondent Gonsalves and/or because he reported suspected law violations by KPD officers in 1995, which ultimately led to disciplinary actions and/or criminal investigations against several KPD officers in 2005. Petitioner thus commenced this action against the County Respondents and Respondent Gonsalves alleging the following claims:

(1) race/national origin discrimination and retaliation in violation of 42 U.S.C. § 2000e-2 et seq., and Haw. Rev. Stat. § 378-2;

(2) violation of 42 U.S.C. § 1981;

(3) civil conspiracy in violation of 42 U.S.C. § 1981 and 42 U.S.C. § 1985;

(4) denial of Due Process, violation of public policy of the State of Hawaii, and breach of Petitioner's employment contract with the County; and

(5) violation of the Hawaii Whistleblowers' Protection Act, as contained in Haw. Rev. Stat. § 378-62.

As the District Court aptly determined, none of these claims are supported in law or fact.

Through a succession of motions for summary judgment brought by County Respondents between December 22, 2006 and September 25, 2007, the District Court dismissed all claims in favor of County Respondents. Notably, with regard to the Petitioner's Due Process claim, the District Court held that Petitioner did not have any protected property interest in his employment because Petitioner's "appointment and contract became void as a matter of law once it was determined that [Petitioner] had become the Chief of Police via a process that violated County law." Order Granting Defendants' Motion for Partial Summary Judgment, May 18, 2007, Petition Appendix at 85a. The District Court therefore granted summary judgment in favor of the County Appellees on Petitioner's Due Process claim.

With regard to Petitioner's claims of animus or bias against Director Tresler, the District Court provided Petitioner more than an ample opportunity to provide evidence of any race- or class-based animus by Director Tresler to support Petitioner's newly alleged Section 1981 claim. In response, Petitioner's counsel relied upon:

(1) Director Tresler's purported statement that the media had blown a matter out of proportion;

(2) Director Tresler's expressed concern, as the Director of Finance, regarding the expense of defending against Petitioner's claim;

(3) Director Tresler's alleged comments to Richard Stauber about wanting to remove certain police commissioners; and

(4) Director Tresler's decision to cancel Petitioner's employment contract.

The District Court was not persuaded by Petitioner's oral argument regarding the alleged "evidence" of racial animus by Director Tresler. The District Court therefore granted summary judgment in favor of Director Tresler on the Third Claim For Relief after finding that Petitioner failed to "raise a genuine issue of fact as to whether Tresler conspired against Lum because of Lum's race." Order Granting Defendant Michael H. Tresler's Motion for Summary Judgment, September 25, 2007, Petition Appendix at 63a.

On March 28, 2008, the Stipulation to Dismiss was filed. The District Court then entered the Order Entering Judgment on April 28, 2008, and a Judgment in a Civil Case based upon a Decision by Court was filed on April 29, 2008.

On April 25, 2008, Petitioner filed his Notice of Appeal and the Ninth Circuit Court of Appeals heard oral arguments on October 14, 2009. In its Memorandum Decision filed on December 1, 2009, the Court of Appeals properly affirmed the District Court's rulings, noting that "[t]he district court correctly determined that [Petitioner] does not have a viable Due Process claim. [Petitioner's] employment agreement was tainted by ethical violations by one of the police commissioners, so it was illegal and void ab

initio." Ninth Circuit Opinion, Petition Appendix at 3a. As to Petitioner's claims against Director Tresler, it also noted that Petitioner had "alleged no facts suggesting that Tresler acted on the basis of racial or class-based animus[.]" Ninth Circuit Opinion, Petition Appendix at 4a. Petitioner's Petition for Panel Rehearing and Petition for Rehearing En Banc were subsequently denied by the Court of Appeals.

For the reasons set forth below, this Court should affirm the Court of Appeals' rulings on those matters.

II. SUMMARY OF ARGUMENT

This case does not require review by this Court or call for an exercise of this Court's supervisory power. Petitioner merely restates his previous arguments and does not offer any legal authority from this Court or other circuits that presents a conflict with the decisions of the lower courts. Accordingly, it cannot be said that the lower court decisions either conflict with relevant decisions of this Court or sanctions such a departure by a lower court so as to warrant review by this Court.

As for the merits of Petitioner's arguments, Petitioner has not set forth any basis to overturn the reasoned rulings of the Ninth Circuit Court of Appeals and the District Court. The lower courts did not err in concluding that Petitioner could not establish the existence of any protected property interest in an employment agreement that had been secured through a tainted process that violated County law and was thus not entitled to any Due Process of law.

The lower courts similarly did not err when they held in favor of Director Tresler as to all claims asserted against him in the Complaint. Petitioner has continually failed to identify any evidence of class- or race-based animus on the part of Director Tresler to support any claim of bias. Petitioner's vague allegations of Director Tresler's partiality is unfounded, especially given that Petitioner has no Due Process interest in his employment.

Under these circumstances, it is respectfully requested that the Petition For Writ Of Certiorari be denied or, alternatively, that the decision of the Ninth Circuit Court of Appeals be affirmed.

III. ARGUMENT

A. Certiorari Is Not Warranted Because Petitioner Merely Repeats His Previously Unsuccessful Arguments Without Articulating A Conflict Or Departure From Judicial Proceedings Necessitating Review By This Court

Contrary to Petitioner's implications, the Ninth Circuit Court of Appeals' decision in this case does not conflict with decisions of this Court or other United States appellate courts on the same matter. The grant of certiorari is governed by U.S. Supreme Court Rule 10, which states, in relevant part:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. ***A petition for a writ of certiorari will be granted***

> ***only for compelling reasons.*** The following, although neither controlling nor fully measuring the court's discretion, indicate the character of the reasons the court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> . . .
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

U.S. Sup. Ct. R. 10 (emphasis added). Although Rule 10 does not provide an inclusive list of all reasons warranting certiorari, it makes clear that Petitioner must present a compelling reason for a grant of certiorari, such as a conflict between the lower court's decision and the decision of another circuit, a state court of last resort, or this Court; or that there has been a departure in the usual course of judicial

proceedings; but not merely that the lower court has made an erroneous factual finding.

In this case, Petitioner completely ignores this applicable standard for a grant of certiorari and provides the Court with no reason that would satisfy the standards laid out in Rule 10. Instead, Petitioner just reargues the exact same points that were correctly discounted by the Court of Appeals and the District Court. Indeed, without directly asserting a conflict, Petitioner cites to cases with which the decision below allegedly conflicts, oblivious to the fact that the exact same cases were unsuccessfully argued in the exact same fashion to the District Court and Court of Appeals. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); *McClure v. Indep. School Dist. No. 16, Mayes County, Oklahoma*, 228 F.3d 1205 (10th Cir. 2000); *Sanchez v. City of Santa Ana*, 915 F.2d 424 (9th Cir. 1990); *Hui Malama Aina O Ko'olau v. Pacarro*, 4 Haw. App. 304, 666 P.2d 177 (1983); *Waikiki Resort Hotel, Inc. v. City and County of Honolulu*, 63 Haw. 222, 624 P.2d 1353 (1981). Upon careful consideration of both Petitioner's arguments and County Respondents' briefs in opposition, both the District Court and the Court of Appeals were unpersuaded by Petitioner's arguments and citations to legal authorities; County Respondents successfully demonstrated that Petitioner's authorities were inapplicable and not dispositive of the instant case. Accordingly, it is misleading of Petitioner to imply that the Ninth Circuit Court of Appeals' opinion

conflicts with decisions of this Court and of other circuits' opinions.

Additionally, County Respondents are compelled to direct the Court's attention to Petitioner's third Question Presented, which presents a newly-raised argument regarding the lower courts' consideration of Judge McConnell's Findings of Fact and Conclusions of Law and his Hearing Officer's Report. Because Petitioner failed to raise this argument before either the District Court or the Court of Appeals, the argument is deemed waived and not appropriate for consideration on appeal. *Duignan v. United States*, 274 U.S. 195, 200 (1927); *Aholelei v. Dept. of Public Safety*, 488 F.3d 1144, 1147 (9th Cir. 2007). Petitioner has additionally articulated no compelling reason why this issue was not previously raised. Accordingly, Petitioner's third Question Presented does not meet the standard for review by this Court.

Under these circumstances, where no true conflict exists given the Ninth Circuit Court of Appeals' clear affirmation of the district court's decision that was well-founded in legal precedent, issuance of a writ of certiorari is not necessary.

B. Review Of The Question Presented On The Merits Confirms That The Ninth Circuit Court Of Appeals And District Court Properly Held That Petitioner Is Not Entitled To Due Process Protection, Therefore Negating Petitioner's Further Tangential Arguments Against Respondents

A review of the Question Presented on the merits would also confirm the validity of the Ninth Circuit's affirmation of the District Court's grant of summary judgment in favor of County Respondents. Petitioner's Due Process claim is based upon the Fourteenth Amendment, which provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. To sustain a Due Process claim, a plaintiff must allege facts from which a reasonable fact finder could conclude that (1) he or she was deprived of a property interest, and (2) that the government did so without Due Process of law. *Huskey v. City of San Jose*, 204 F.3d 893, 900 (9th Cir. 2000) (citing *Brewster v. Bd. of Educ. of the Lynwood Unified School Dist.*, 149 F.3d 971, 982 (9th Cir. 1998)). The lower courts in this case correctly held that Petitioner failed to establish the existence of any protected property interest in an employment position that he had obtained through a tainted process that violated County law. Without any property interest, Petitioner clearly cannot support any Due Process claim, as a matter of law.

According to Petitioner, his "employment agreement and the County Charter specifically gave him

due process rights if he were to face termination." *See* Petition at 22. Such a broad, unfounded statement underscores the fact that Petitioner's entire position is based upon the mistaken premise that Petitioner was "terminated" from his employment without being given an adequate opportunity to state his objections. Petitioner, however, fails to address the fact that he never had a protected property interest in his employment agreement in the first place because his selection to the position of Chief of Police arose from a compromised process that violated the Kauai County Charter and the Kauai County Code. Accordingly, Due Process rights never materialized because Petitioner's appointment was void from the outset, as a matter of law.

County Respondents do not dispute that a public employee may have a property interest in continued employment. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-39 (1985). However, contrary to Petitioner's assumptions, not every public employment situation creates an expectation of continued employment that rises to the level of a property interest protected by the Due Process Clause. *See Pleva v. Norquist*, 195 F.3d 905, 914 (7th Cir. 1999). The property interest is derived from and defined by state law. *See Shlay v. Montgomery*, 802 F.2d 918, 921 (7th Cir. 1986); *see also Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) (property interest must be established "by existing rules or understandings that stem from an independent source such as state law – rules or

understandings that secure certain benefits and that support claims of entitlement to those benefits"). As correctly held by both the Court of Appeals and the District Court, Petitioner never derived any "legitimate claim of entitlement" to the Chief of Police position because the manner in which he was selected violated the County Charter and Code of Ethics provisions.

The record evidences that Judge McConnell, an independent and well-respected hearing officer, conducted a contested case hearing during which he evaluated all of the evidence and listened to oral testimony before ultimately concluding that Ching had, in fact, violated Article XX, Section 20.02E of the Kauai County Charter and Chapter 3, Article 1, Section 3-1.6 of the Kauai County Code when he used his position as a Commissioner to secure an unwarranted advantage and treatment for Petitioner over the other candidates for Chief of Police. There is no dispute that each party to that hearing was afforded a full and complete opportunity to call and examine witnesses and to offer evidence.

Petitioner similarly does not dispute that the tainted selection process that resulted in Petitioner's appointment as Chief of Police violated County law. Chapter 3, Article 1, Section 3-1.11(a) of the Kauai County Code provides that:

> In addition to any other penalty provided by law, **any contract entered into by the County in violation of this Article [*i.e.*,**

> **Code of Ethics] is voidable on behalf of the County at the option of the Director of Finance**, provided that in any action to avoid a contract pursuant to this Section in the interests of third parties who may be damaged thereby shall be taken into account, and the action to void the transaction is initiated within sixty (60) days after the determination of a violation under this Article. The County Attorney shall have the authority to enforce this provision.

Kauai County Code § 3-1.11(a) (emphasis added). Section 3-1.11(b) of the Kauai County Code further provides:

> Any favorable county action obtained in violation of any of the standards for councilmen or employees is voidable in the same manner as voidable contracts as provided for under Section 3-1.11(a); and the County by the County Attorney may pursue all legal and equitable remedies available to it.

Kauai County Code § 3-1.11(b). These provisions make clear that any contract entered into in violation of the Code of Ethics could be voided by the Director of Finance if done within sixty days, and if the interests of third parties are taken into account. Petitioner does not dispute that the County Respondents followed the procedure set forth in Chapter 3, Article 1, Section 3-1.11(a) of the Kauai County Code. Petitioner, however, appears to disagree with the decision to follow that procedure.

In his Petition, Petitioner again relies upon a legal theory that he did not argue before the District Court and raised for the first time before the Court of Appeals. Issues raised for the first time on appeal are generally deemed waived. *Aholelei v. Dept. of Public Safety*, 488 F.3d 1144, 1147 (9th Cir. 2007). The appellate court will review an issue not raised in the district court only if necessary to prevent manifest injustice, and if the proponent shows exceptional circumstances why the issue was not raised below. *Int'l Union of Bricklayers & Allied Craftsman Local 20 v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985). Review of the issue regarding whether the misconduct of one Commissioner should invalidate the whole Commission's decision is not necessary to prevent manifest injustice. Petitioner has not alleged any exceptional circumstances that prevented him from raising this new legal theory below. Therefore, this Court need not decide this issue which was raised for the first time on appeal.

Even if the Court decides to undertake review of this issue, Petitioner does not dispute that the County Respondents had the authority to void his contract under the County rules and that the County Respondents followed the correct procedure. Petitioner now infers that the misconduct of one Commissioner should not have invalidated the action of the rest of the Commission who voted to select Petitioner as Chief of Police. To support this argument, Petitioner again relies on *Hui Malama Aina O Ko'olau v. Pacarro*, 4 Haw. App. 304, 666 P.2d 177

(1983) and *Waikiki Resort Hotel, Inc. v. City and County of Honolulu*, 63 Haw. 222, 624 P.2d 1353 (1981). Both of these cases, however, were already considered by the Court of Appeals and are distinguishable from the facts of this appeal.

First, unlike *Hui Malama* and *Waikiki Resort*, in this appeal, an independent hearing officer, Judge E. John McConnell, evaluated the process and found that Ching conferred an unfair advantage upon Petitioner. Based on the independent evaluation of Judge McConnell, the Ethics Board recommended to the Council that the Director of Finance void Petitioner's employment contract.

Furthermore, in *Waikiki Resort* and *Hui Malama*, the disqualification of the board member was based on failing to make proper disclosures. *Waikiki Resort*, 63 Haw. at 248-49, 624 P.2d at 1371-72; *Hui Malama*, 4 Haw. App. at 318, 666 P.2d at 186. In this case, however, the disqualification of Ching was not based on an inadvertent failure to disclose a conflicting interest; rather, Ching actively worked in a way that manipulated the whole process by conducting a concerted campaign to get Petitioner elected to the Chief of Police position. As such, the Petitioner cannot argue that the selection of Petitioner as Chief of Police should stand despite Ching's actions which tainted the overall selection process.

Petitioner simply cannot get around the fact that an employment agreement that is null and void, such as the employment contract being evaluated here, is

incapable of creating any property interest because such a contract cannot conceivably give rise to a legitimate expectation of continued employment. *See Shlay*, 802 F.2d at 922. Public employment contracts that violate statute or ordinance are void from the outset and, as such, cannot give rise to a protected property interest because no such interest can arise from an illegal contract. *Walsh v. Bollas*, 612 N.E.2d 1252, 1256 (Ohio Ct. App. 1992) (holding that no Due Process rights can arise from public employment contract that is void for being in violation of anti-nepotism rule).

The District Court aptly relied on cases from other jurisdictions to support its conclusion that contracts that are null and void are incapable of creating property interests because they are incapable of giving rise to any legitimate expectation of continued employment. *See Shlay*, 802 F.2d at 922 ("There is no question that contracts which are in violation of law are null and void. . . . It is also clear that contracts which are null and void are incapable of creating property interests since such a contract cannot conceivably give rise to a legitimate expectation of continued employment. . . ."); *Walters v. Village of Colfax*, 466 F. Supp. 2d 1046, 1057 (C.D. Ill. 2006) (the court refused to rewrite the employment contract, and instead, held that the employment contract was completely unenforceable because it was void from the moment of execution, and therefore could not provide the plaintiff with a constitutionally protected property interest); *City of Beaumont v.*

Spivey, 1 S.W.3d 385, 396 (Tex. App. 1999) (because appointment for public employment did not substantially comply with applicable statutes, court held that the appointment was null and void from the outset, and therefore incapable of conferring an expectation of a property interest in continued employment); *Walsh*, 612 N.E.2d at 1256 (no Due Process rights can arise from public employment contract which is void for being in violation of a state anti-nepotism law because "no rights may arise from an illegal contract.").

The Ninth Circuit Court of Appeals subsequently affirmed the District Court's reasoning, holding that:

> [t]he district court correctly determined that Lum did not have a property interest in his employment and, thus, does not have a viable due process claim. Lum's employment agreement was tainted by ethical violations by one of the police commissioners, so it was illegal and void ab initio. *Cf. Peine v. Murphy*, 377 P.2d 708, 712 (Haw. 1962). A void contract cannot give rise to a property interest. *See Bollow v. Fed. Reserve Bank of S.F.*, 650 F.2d 1093, 1099 (9th Cir. 1981).

Ninth Circuit Opinion, Petition Appendix at 3a. As correctly noted by the Court of Appeals, Lum's

employment contract was void for fraud, and thus could not convey any Due Process protection.[1]

Petitioner does not offer any legal authority to refute the lower courts' rulings. Instead, Petitioner relies heavily upon cases that are inapposite here. In his Petition, Petitioner cites the following three cases for support, all three of which Petitioner presented to the Ninth Circuit Court of Appeals: *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); *McClure v. Indep. School Dist. No. 16, Mayes County, Oklahoma*, 228 F.3d 1205 (10th Cir. 2000); and *Sanchez v. City of Santa Ana*, 915 F.2d 424 (9th Cir. 1990). These cases, however, fail to support Petitioner's untenable position that a "property interest" somehow materializes when the process by which he was selected to his

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[1] Indeed, under Hawaii law, if a contract is void, it is treated as a nullity. For example, where a contract is void as a result of "fraud in the factum," the following is applicable:

> If, because of a misrepresentation as to the character or essential terms of a proposed contract, a party does not know or have reasonable opportunity to know of its character or essential terms, then he neither knows nor has reason to know that the other party may infer from his conduct that he assents to that contract. In such a case there is no effective manifestation of assent and **no contract at all**.

See Standard Finance Co., Ltd. v. Ellis, 3 Haw. App. 614, 618, 657 P.2d 1056, 1059 (1983) (citing Restatement (Second) of Contracts § 163, cmt. a (1981)) (emphasis added). Similarly, an agreement that is declared void *ab initio* as contrary to public policy is simply invalid as to the parties. *See Burk v. Sunn*, 68 Haw. 80, 705 P.2d 17 (1985).

employment position was undisputably flawed. Moreover, the facts in the three cases differ significantly from the facts in this case because the plaintiffs in each of Petitioner's cited cases all had a property interest in their positions, unlike Petitioner, but were then either terminated from their employment or denied some employment benefit based upon some purported "cause." The three cases are clearly distinguishable, and are therefore inapplicable here.

Accordingly, Petitioner has no "legitimate claim of entitlement" to his continued employment as Police Chief, and accordingly, no property interest protected by the Due Process Clause. As such, Petitioner's arguments that he was denied Due Process protection by Director Tresler and by the adoption of the hearing officer's ruling are without merit. The lower courts therefore did not err in finding in favor of the County Respondents as to Petitioner's Due Process claim.

IV. CONCLUSION

Based on the foregoing reasons and authorities, Respondents Kauai County Council, Bryan Baptiste, Michael H. Tresler, and Kauai County respectfully request that Petitioner King Chi Lum's Petition For Writ Of Certiorari be denied, or alternatively, the decision of the Ninth Circuit Court of Appeals be affirmed.

Dated: Honolulu, Hawaii, July 21, 2010.

Respectfully submitted,

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